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v. 2948 No. 14856

United States
Court of Appeals
for the Ninth Circuit

WILLIAM RICHARDS, CLANCY HENKINS, JOSEPH L. RIEDI, ROBERT S. SCHY and LOIS LANE,

Appellants,

vs.

JUNEAU INDEPENDENT SCHOOL DISTRICT and DOUGLAS INDEPENDENT SCHOOL DISTRICT, to Be Known as JUNEAU-DOUGLAS INDEPENDENT SCHOOL DISTRICT,

Appellees.

Transcript of Record

Appeals from the District Court for the District of Alaska, Division Number One

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-18-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

ROBERTSON, MONAGLE & EASTAUGH, by
M. E. MONAGLE,
Seward Bldg.,
Juneau, Alaska,

For Appellant.

FAULKNER, BANFIELD & BOOCHEVER, by
R. BOOCHEVER,
Juneau, Alaska,

For Appellee.

In the District Court for the District of Alaska, Division Number One at Juneau

No. 7236-A

In the Matter of:

The Consolidation of the JUNEAU INDEPENDENT SCHOOL DISTRICT and the DOUGLAS INDEPENDENT SCHOOL DISTRICT to Be Known as JUNEAU-DOUGLAS INDEPENDENT SCHOOL DISTRICT

APPLICATION FOR ORDER CALLING FOR ELECTION

Comes Now the Douglas Independent School District, by its attorneys, Faulkner, Banfield & Boochever, alleging as follows:

1. The Juneau Independent School District embraces that territory within the Juneau Recording Precinct, First Judicial Division, Territory of Alaska, consisting of approximately 202 square miles, and described as follows, to wit:

> Beginning at a point in the center of the Juneau-Douglas brige spanning Gastineau Channel, running thence N. 45 deg. W. 4.59 miles to a point in Gastineau Channel; thence W. 1.72 miles to a point in Gastineau Channel; thence S. 65 deg. W. 3.73 miles to a point lying in a southerly direction from Spuhn Island from which point the center of the Juneau-Douglas bridge bears S. 63 deg. E. 11.10 miles; thence N. 45 deg. E. 2.00 miles; thence N. 63

deg. 00 min. W. 3.30 miles to a point north of Portland Island; thence N. 22 deg. 00 min. W. 25.17 miles to a point lying northwesterly of Benjamin Island; thence N. 68 deg. 00 min. W. 4.50 miles to a point; thence S. 34 deg. 30 min. E. 14.10 miles to a point on Mt. McGinnis; thence S. 54 deg. 00 min. E. 13.41 miles to a point on Mt. Olds; thence S. 30 deg. 40 min. E. 6.61 miles to a point; thence S. 43 deg. 00 min. W. 3.14 miles through Corner No. 4 of U. S. Survey No. 328 to a point in Gastineau Channel; thence N. 47 deg. 00 min. W. 8.03 miles to the center point of the Juneau-Douglas bridge, the point of beginning; containing 202 square miles, more or less.

2. The Douglas Independent School District embraces that territory within the Juneau Recording Precinct, First Judicial Division, Territory of Alaska, consisting of 95.2 square miles, more or less, and described as follows, to wit:

Beginning at a point in the center of the Juneau-Douglas brige spanning Gastineau Channel, thence N. 45 deg. W. 4.95 miles to a point in the Gastineau Channel; thence W. 1.72 miles to a point in Gastineau Channel southeast of Juneau; thence S. 65 deg. W. 3.73 miles to a point south of Spuhn Island; thence N. 63 deg. W. 3.30 miles to a point north of Portland Island; thence S. 52 deg. 30 min. E. 0.76 miles to a point northwest of Portland Island; thence S. 34 deg. 40 min. E. 9.96 miles to a

point in Stephens Passage west of Douglas Island; thence S. 77 deg. 30 min. E. 13.2 miles to a point in Stephens Passage south of Marmion Island; thence N. 37 deg. 20 min. E. 1.54 miles to a point in Gastineau Channel in direct line between Marmion Island and Point Bishop; thence N. 47 deg. W. 10.04 miles to the center of the Juneau-Douglas bridge, the point of beginning.

3. The combined area of the Juneau Independent School District and the Douglas Independent School District consists of 297.2 square miles, more or less, and is less than 1,000 square miles.

4. Petitions have been signed by 341 voters of the Juneau Independent School District requesting that the Juneau Independent School District and the Douglas Independent School District be consolidated in accordance with the provisions of Ch. 93, S.L.A. 1953. 1,226 persons voted at the last general election held in the Juneau Independent School District and petitioners totalling more than 25% of the number of people who voted in such election have signed the aforesaid petitions, which petitions are attached hereto as Exhibit "A."

5. Petitions have been signed by 74 voters of the Douglas Independent School District requesting that the Juneau Independent School District and the Douglas Independent School District be consolidated in accordance with the provisions of Ch. 93, S.L.A. 1953. 208 persons voted at the last general election held in the Douglas Independent School

District and petitioners totalling more than 25% of the number of people who voted in such election have signed the aforesaid petitions, which petitions are attached hereto as Exhibit "B."

6. Said petitioners have proposed that the name of the consolidated school districts be "Juneau-Douglas Independent School District."

7. The Juneau Independent School District at the present time has a 1% consumers' tax on retail sales, rents and services for the exclusive special purpose of paying installments of principal and interest on indebtedness to be incurred for the purpose of securing and preparing a site for a high school building; constructing and equipping a new high school; and renovating, repairing and equipping the existing Fifth Street Grade School and High School building; which projects, other than the acquisition and preparation of a site, are to be constructed by the Alaska Public Works administration under the Alaska Public Works program and sold to the Juneau Independent School District. In order for taxes in all parts of the proposed consolidated school district to be equal, it will be necessary for the Douglas Independent School District to have a similiar 1% sales tax for the purposes specified above. The City of Douglas at the present time has a 1% sales tax for school purposes and the Common Council of the City of Douglas has resolved that said 1% sales tax shall be used for the school purposes specified in the Juneau Independent School District sales tax ordinance, as is more fully

set forth in the attached Resolution No. 201 of the Common Council of the City of Douglas. Since the ordinances of the larger of the independent school districts, according to the number of registered voters in the last general election held therein, shall be in effect upon the entry of an order consolidating the districts, those voters in the Douglas Independent School District lying outside the corporate boundaries of the City of Douglas shall automatically authorize a 1% sales tax in that portion of the Douglas Independent School District in the event that a majority of voters voting at such election are in favor of such consolidation.

Wherefore, applicant prays that this court order an election to be held in the Juneau Independent School District and in the Douglas Independent School District for the purpose of determining whether the people desire such consolidation, and that the court, by said order, fix the date for said election, the place and hours of voting, and appoint three qualified voters in the proposed consolidated school district to supervise and appoint election officers for such election; that the court further order that a printed or typewritten copy of said order be posted in at least three public places within the limits of each of the Independent school districts requesting consolidation for at least thirty days prior to the date of election; and that the qualified electors at said election shall, at the same time, by separate ballot, choose a board of five directors for the consolidated school district who must be qual-

ified electors of the consolidated school district and whose terms of office shall be as specified in Ch. 93, S.L.A. 1953. Said order shall further provide that said election be conducted in the manner specified and in accordance with the provisions of Ch. 93, S.L.A. 1953.

It is Further Prayed that, if a majority of the votes cast at said election in each of the independent school districts is in favor of consolidation, a further order be entered in writing adjudging and declaring that said independent school districts are consolidated, and that the enlarged area shall thenceforth constitute one school district to be known as the Juneau-Douglas Independent School District, in accordance with the provisions of Ch. 93, S.L.A. 1953.

Dated at Juneau, Alaska, this 20th day of January, 1955.

FAULKNER, BANFIELD & BOOCHEVER

By /s/ R. BOOCHEVER,
Attorneys for Douglas Independent School District.

EXHIBIT "A"

Petition

To the Hon. George W. Folta, Judge, District Court for the Territory of Alaska, Division Number One at Juneau.

We the undersigned voters of the Juneau Independent School District, being more than 25%

of the number of people who voted in the Juneau Independent School District at the last general election, do hereby petition that the Juneau Independent School District and the Douglas Independent School District be consolidated in accordance with the provisions of Chapter 93, S.L.A. 1953.

The Juneau Independent School District embraces that territory within the Juneau Recording Precinct, First Judicial Division, Territory of Alaska, consisting of approximately 202 square miles, and described as follows, to wit:

> Beginning at a point in the center of the Juneau-Douglas bridge spanning Gastineau Channel, Running thence N. 45 deg. W. 4.59 miles to a point in Gastineau Channel; thence W. 1.72 miles to a point in Gastineau Channel; thence S. 65 deg. W. 3.73 miles to a point lying in a southerly direction from Spuhn Island from which point the center of the Juneau-Douglas bridge bears S. 63 deg. E. 11.10 miles; thence N. 45 deg. E. 2.00 miles; thence N. 63 deg. 00 min. W. 3.30 miles to a point north of Portland Island; thence N. 22 deg. 00 min. W. 25.17 miles to a point lying northwesterly of Benjamin Island; thence N. 68 deg. 00 min. W. 4.50 miles to a point; thence S. 34 deg. 30 min. E. 14.10 miles to a point on Mt. McGinnis; thence S. 54 deg. 00 min. E. 13.41 miles to a point on Mt. Olds; thence S. 30 deg. 40 min. E. 6.61 miles to a point; thence S. 43 deg. 00 min. W. 3.14 miles through Corner No. 4 of U. S. Survey No. 328

to a point in Gastineau Channel; thence N. 47 deg. 00 min. W. 8.03 miles to the center point of the Juneau-Douglas bridge, the point of beginning; containing 202 square miles, more or less.

The Douglas Independent School District embraces that territory within the Juneau Recording Precinct, First Judicial Division, Territory of Alaska, consisting of 95.2 square miles, more or less, and described as follows, to wit:

Beginning at a point in the center of the Juneau-Douglas bridge spanning Gastineau Channel, thence N. 45 deg. W. 4.95 miles to a point in the Gastineau Channel; thence W. 1.72 miles to a point in Gastineau Channel southeast of Juneau; thence S. 65 deg. W. 3.73 miles to a point south of Spuhn Island; thence N. 63 deg. W. 3.30 miles to a point north of Portland Island; thence S. 52 deg. 30 min. E. 0.76 miles to a point northwest of Portland Island; thence S. 34 deg. 40 min. E. 9.96 miles to a point in Stephens Passage west of Douglas Island; thence S. 77 deg. 30 min. E. 13.2 miles to a point in Stephens Passage south of Marmion Island; thence N. 37 deg. 20 min. E. 1.54 miles to a point in Gastineau Channel in direct line between Marmion Island and Point Bishop; thence N. 47 deg. W. 10.04 miles to the center of the Juneau-Douglas bridge, the point of beginning.

The Combined area of the Juneau Independent School District and the Douglas Independent School district consists of 297.2 square miles, more or less, and is less than 1,000 square miles.

The proposed name of the consolidated school districts is Juneau-Douglas Independent School District.

[Here follows 8 identical Petitions of Juneau Independent School District with signatures totaling 519.]

EXHIBIT "B"

Petition

To the Hon. George W. Folta, Judge District Court for the Territory of Alaska, Division Number One at Juneau.

We the undersigned voters of the Douglas Independent School District, being more than 25% of the number of people who voted in the Douglas Independent School District at the last general election, do hereby petition that the Douglas Independent School District and the Juneau Independent School District be consolidated in accordance with the provisions of Chapter 93, S.L.A. 1953.

The Douglas Independent School District embraces that Territory within the Juneau Recording Precinct, First Judicial Division, Territory of Alaska, consisting of 95.2 square miles, more or less, and described as follows, to wit:

Beginning at a point in the center of the Juneau-Douglas bridge spanning Gastineau

Channel, thence N. 45 deg. W. 4.95 miles to a point in the Gastineau Channel; thence W. 1.72 miles to a point in Gastineau Channel southeast of Juneau; thence S. 65 deg. W. 3.73 miles to a point south of Spuhn Island; thence N. 63 deg. W. 3.30 miles to a point north of Portland Island; thence S. 52 deg. 30 min. E. 0.76 miles to a point northwest of Portland Island; thence S. 34 deg. 40 min. E. 9.96 miles to a point in Stephens Passage west of Douglas Island; thence S. 77 deg. 30 min. E. 13.2 miles to a point in Stephens Passage south of Marmion Island; thence N. 37 deg. 20 min. E. 1.54 miles to a point in Gastineau Channel in direct line between Marmion Island and Point Bishop; thence N. 47 deg. W. 10.04 miles to the center of the Juneau-Douglas bridge, the point of beginning.

The Juneau Independent School District embraces that Territory within the Juneau Recording Precinct, First Judicial Division, Territory of Alaska, consisting of approximately 202 square miles, and described as follows, to wit:

Beginning at a point in the center of the Juneau-Douglas bridge spanning Gastineau Channel, running thence N. 45 deg. W. 4.59 miles to a point in Gastineau Channel; thence W. 1.72 miles to a point in Gastineau Channel; thence S. 65 deg. W. 3.73 miles to a point lying in a southerly direction from Spuhn Island, from which point the center of the Juneau-Douglas bridge bears S. 63 deg. E. 11.10 miles; thence N. 45 deg. E. 2.00 miles; thence N.

63 deg. 00 min. W. 330 miles to a point north of Portland Island; thence N. 22 deg. 00 min. W. 25.17 miles to a point lying northwesterly of Benjamin Island; thence N. 68 deg. 00 min. W. 4.50 miles to a point; thence S. 34 deg. 30 min. E. 14.10 miles to a point on Mt. McGinnis; thence S. 54 deg. 00 min. E. 13.41 miles to a point on Mt. Olds; thence S. 30 deg. 40 min. E. 6.61 miles to a point; thence S. 43 deg. 00 min. W. 3.14 miles through Corner No. 4 of U. S. Survey No. 328 to a point in Gastineau Channel; thence N. 47 deg. 00 min. W. 8.03 miles to the center point of the Juneau-Douglas bridge, the point of beginning; containing 202 square miles, more or less.

The combined area of the Juneau Independent School District and the Douglas Independent School District consists of 297.2 square miles, more or less, and is less than 1,000 square miles.

The proposed name of the consolidated school districts is Juneau-Douglas Independent School District.

[Here follows 2 identical petitions of Douglas Independent School District with signatures totaling 75.]

[Endorsed]: Filed January 21, 1954.

[Title of District Court and Cause.]

ORDER CALLING FOR ELECTION

This Matter, coming on to be heard upon the filing of separate petitions by the voters of the Juneau Independent School District and the voters of the Douglas Independent School District, petitions from each of said districts having been signed by voters representing more than 25% of the number of people who voted in the respective independent school districts at the last general election, which petitions request the consolidation of the Juneau Independent School District and the Douglas Independent school District and comply with the requirements of Ch. 93, S.L.A. 1953, and an application having been filed herein by the Douglas Independent School District for an order calling for elections in both of said school districts to determine whether the people desire such consolidation; and good cause having been shown,

It is Hereby Ordered that the prayer contained in said application be and the same is granted.

It is Further Ordered that an election be held in each of said independent school districts, namely, the Juneau Independent School District and the Douglas Independent School District, for the purpose of determining whether the people desire such consolidation, in which event the consolidated school district shall be known as the Juneau-Douglas Independent School District. Said election shall be held between the hours of 7:00 a.m. and 7:00 p.m.

on March 8, 1955, and the voting places for voters in the Juneau Independent School District shall be at the City Hall in the City of Juneau and at DeHart's Store at Auke Bay. The voting places for voters in the Douglas Independent School District shall be at the City Hall in the City of Douglas and at the Herbert Savikko home in West Juneau.

Separate elections shall be held in each of said independent school districts, at which elections the voters shall vote for or against consolidation of said school districts and at the same time, by separate ballot, shall choose a board of five directors for the consolidated school district. A form of printed or written ballot suitable for determining the question of whether the voters in each of said districts are in favor of or against the consolidation of said districts, and providing for the election of five directors who must be qualified electors of the school districts, shall be provided by the judges of election.

Marcus Jensen of Douglas, J. S. Mackinnon of Juneau and Gene Vuille of Juneau, are hereby appointed as election judges and are hereby authorized to appoint election officers for such elections. The judges of election shall, before entering upon their duties of office, take an oath in writing to faithfully and impartially discharge the duties of their trust, and they shall duly canvass and compile the votes cast and issue under their hands and seals a certificate in quadruplicate showing the number of votes cast in favor of consolidation and the number of votes cast against consolidation. One of said certificates, together with all ballots and oaths of the

judges of election, shall immediately be filed with the clerk of the District Court for the District of Alaska at Juneau; another of said certificates shall be filed with the Territorial Board of Education, the third of said certificates shall be filed with the Board of directors of the Juneau Independent School District, and the fourth of said certificates shall be filed with the Board of Directors of the Douglas Independent School District.

It is Further Ordered that printed or typewritten copies of this order shall be posted in at least three public places within the limits of each of the independent school districts requesting consolidation for a period of at least thirty (30) days prior to the date of election, and that such posting shall constitute notice of such elections.

The judges of election shall canvass the votes given in such election for members of the Board of Directors as well as the votes cast for and against consolidation, and said judges shall declare the five candidates who have received the largest number of votes for such office duly elected and shall issue and deliver to them certificates of their election provided that the majority of votes cast in each of such districts have voted for consolidation.

The qualifications of electors at such elections shall be as follows: All citizens of the United States, twenty-one (21) years of age and over, who are actual and bona fide residents of Alaska, who have been such residents continuously during the entire year immediately preceding the election, and who

have been such residents continuously for thirty (30) days next preceding the election in such school district, and who are able to read and write the English language as prescribed by an Act of the United States Congress on March 3, 1927, entitled "An Act to prescribe certain qualifications of voters in the Territory of Alaska, and for other purposes," shall be qualified to vote at such elections; provided, however, that the requirements of this section as to ability to read and write shall not apply to any person who is incapacitated from complying therewith by reason of physical disability alone.

Done in Open Court this 21st day of January, 1955.

[Seal] /s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed January 21, 1954.

Resolution

Whereas, the undersigned were duly appointed as judges of elections by virtue of that certain order calling for an election issued by the District Court for the Territory of Alaska, Division Number One at Juneau, dated January 21, 1955; and

Whereas, elections are to be held for the purpose of determining whether the voters of the Juneau Independent School District and the voters of the Douglas Independent School District are in favor of the consolidation of said school districts under

the name of Juneau-Douglas Independent School District; and

Whereas, at said elections the voters shall at the same time, by separate ballot, choose a board of five directors for the consolidated school district;

Now, Therefore, be it Resolved by the undersigned judges of election that there shall be submitted, or cause to be submitted, to the qualified voters as hereinafter specified to be voted upon at said elections to be held in the Juneau Independent School District and the Douglas Independent School District on March 8, 1955, between the hours of 7:00 a.m. and 7:00 p.m. the following proposal:

Proposal

Shall the Juneau Independent School District and the Douglas Independent School District be consolidated under the name of Juneau-Douglas Independent School District, in which event the ordinances of the Juneau Independent School District, being the larger of said school districts according to the number of registered voters at the last general election held therein, shall be in effect in such consolidated school district, including the ordinance providing for a 1% tax on retail sales and services, which tax shall automatically become effective in that portion of the Douglas Independent School District located beyond the corporate limits of the City of Douglas, Alaska, upon entry of an order by the District Court consolidating said school districts. In the event of the approval of this proposal by a majority of the voters of each of said school districts, the

order consolidating said school districts shall be contingent on the Common Council of the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax.

Each ballot shall set forth the above proposition preceded by the instructions:

> "Vote for or against the following proposal by placing an 'x' in the appropriate box," and followed by the words:
>
> For Consolidation ☐
> Against Consolidation ☐

Be It Further Resolved that a separate form of ballot be prepared for the election of five members of the Board of Directors of the consolidated school district. All candidates for election to the Board of Directors of such consolidated school district, in order to have their names appear on said ballot, must file their applications at the office of the Clerk of the City of Douglas, Alaska, at Douglas, Alaska, or at the office of the Clerk of the City of Juneau, Alaska, at Juneau, Alaska, on or before 12:00 noon, March 4, 1955.

The qualifications of voters in each of the independent school districts at elections shall be as follows:

> "All citizens of the United States, twenty-one (21) years of age and over, who are actual and bona fide residents of Alaska, who have been

such residents continuously during the entire year immediately preceding the election, and who have been such residents continuously for thirty (30) days next preceding the election in such school district, and who are able to read and write the English language as prescribed by an Act of the United States Congress on March 3, 1927, entitled, 'An Act to prescribe certain qualifications of voters in the Territory of Alaska, and for other purposes,' shall be qualified to vote at such elections; provided, however, that the requirements of this section as to ability to read and write shall not apply to any person who is incapacitated from complying therewith by reason of physical disability alone." Section 37-3-44, ACLA 1949.

Be It Further Resolved that, prior to voting, all voters shall first register at the voting places hereinafter designated on the date set for said elections in the registration books which shall be supplied by the judges of election for such purpose, stating the voter's full name and residence address in the district, and such registration shall constitute a declaration that the person so registering is qualified to vote at said election.

The entire area of the Juneau Independent School District shall constitute one voting precinct and there shall be two voting places within said precinct which shall be as follows:

DeHart's Store at Auke Bay, Alaska, and Juneau City Hall, Juneau, Alaska.

The entire area of the Douglas Independent

School District shall constitute one voting precinct and there shall be two voting places within said precinct which shall be as follows:

Herbert Savikko residence, West Juneau, Alaska, and Douglas City Hall, Douglas, Alaska.

Be It Further Resolved that the following named election officials are hereby appointed to assist in the conduct of said elections at the polling places indicated:

DeHart's Store, Auke Bay, Alaska:

Mrs. Beth Ogden
Mrs. Mabel Reddekopp
Mrs. Myrtle Lindegaard

Juneau City Hall, Juneau, Alaska:

Harold K. Dawson
Mrs. Esther Kassner
Mrs. Mabel Lybeck

Herbert Savikko residence, Douglas, Alaska:

Mrs. Herbert Savikko
Mrs. Opal Sears
Mrs. William Helin

Douglas City Hall, Douglas, Alaska:

Mrs. Lucille Weir
Mrs. Alfred Bonnett
Mrs. Albert Groskopf

Passed and approved by the undersigned judges of election this 3rd day of February, 1955.

/s/ MARCUS JENSEN,
/s/ J. S. MacKINNON,
/s/ KENNETH E. VUILLE.

[Endorsed]: Filed March 10, 1955.

OATH OF JUDGES OF ELECTION

We, the undersigned, having been appointed judges for the elections to be held in the Juneau Independent School District and in the Douglas Independent School District on March 8, 1955, being first severally duly sworn according to law, do each depose and say:

I will faithfully and impartially discharge the duties as such judge of election, and shall duly canvass and cancel the votes cast and issue under my hand and seal a certificate in quadruplicate showing the number of votes cast in favor of consolidation and the number of votes cast against consolidation, and which shall also show the number of votes cast for each person who is a candidate for member of the Board of Directors of the consolidated school district; and I will faithfully uphold the constitution and laws of the United States and the laws of the Territory of Alaska, So Help Me God.

/s/ MARCUS JENSEN,

/s/ J. S. MacKINNON,

/s/ KENNETH E. VUILLE.

Subscribed and sworn to before me this 31st day of January, 1955.

[Seal] /s/ R. BOOCHEVER,
Notary Public for Alaska.

My commission expires: November 7, 1955.

[Endorsed]: Filed March 10, 1955.

CERTIFICATE OF ELECTION

United States of America,
Territory of Alaska—ss.

We, Kenneth E. Vuille, Marcus Jensen and J. S. MacKinnon, having been appointed judges of election of the certain election held on March 8, 1955, by the Juneau Independent School District and the Douglas Independent School District for the purpose of determining whether the voters of said districts are in favor of the consolidation of said school districts under the name of Juneau-Douglas Independent School District, and for the purpose at the same time of choosing a board of five directors for such consolidated school district, do hereby certify that at said election in the Juneau Independent School District for the purpose of voting on the following proposal:

Proposal

Shall the Juneau Independent School District and the Douglas Independent School District be consolidated under the name of Juneau-Douglas Independent School District, in which event the ordinances of the Juneau Independent School District, being the larger of said school districts according to the number of registered voters at the last general election held therein, shall be in effect in such consolidated school district, including the ordinance providing for a 1% tax on retail sales and services, which tax shall automatically become effective in that portion of

the Douglas Independent School District located beyond the corporate limits of the City of Douglas, Alaska, upon entry of an order by the District Court consolidating said school districts. In the event of the approval of this proposal by a majority of the voters of each of said school districts, the order consolidating said school districts shall be contingent on the Common Council of the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax;

the results of the balloting were as follows:

Yes	702
No	239
Number of ballots rejected	9
Number of ballots cast	950

We do further certify that in the Douglas Independent School District for the purpose of voting on the above set forth proposal, the results of the balloting were as follows:

Yes	274
No	209
Number of ballots rejected	6
Number of ballots cast	489

We do further certify that in the voting in regard to candidates for the Board of Directors of the con-

solidated school district, the results of the balloting were as follows:

Name	Number of Votes Juneau	Douglas	Total
F. Dewey Baker	648	209	857
Pat Ellsworth	422	300	722
Matt K. Gormley	555	267	822
John G. Hagmeier	597	197	794
Charles H. Jones	340	300	640
J. S. MacKinnon, Jr.	591	191	782
James P. Orme	594	253	847
Curtis G. Shattuck	611	227	838
James J. Mahar	1		1
Harry Olds	1		1
Christian A. Jensen	1		1
Glenn G. Oakes	1		1
Dr. J. O. Rude	1		1
Dr. Wm. Whitehead	1		1
Leonard Johnson		1	1
Ed Merdes		1	1
Dave Brown		1	1
Elwin Wright		1	1
Wm. Kerns		1	1
Number of ballots rejected	33	61	94
Number of ballots cast	950	489	1,439

/s/ KENNETH E. VUILLE,
/s/ J. S. MacKINNON,
/s/ MARCUS JENSEN.

Severally subscribed and sworn to before me this 10th day of March, 1955.

[Seal] /s/ R. BOOCHEVER,
Notary Public for Alaska.

My commission expires: Nov. 7, 1955.

[Endorsed]: Filed March 10, 1955.

John H. Dimond
Attorney at Law

P. O. Box 366
Juneau, Alaska

March 15, 1955.

Honorable George W. Folta,
United States District Judge,
Juneau, Alaska.

Re: Consolidation of The Juneau & Douglas Independent School Districts,
No. 7236-A.

Dear Judge Folta:

A regular meeting of the Common Council of the City of Douglas, Alaska, was held on March 14, 1955. There was no quorum at such meeting; there being present only three members of the Council and the Mayor. At such meeting I was directed by the Mayor and the three Councilmen present to advise you of these facts:

1. In the Notice of Election in respect to the consolidation of the Juneau and Douglas Independent School Districts, and in the ballot used at such election which was held on March 8, 1955, it was specified in part as follows:

> " * * * the order consolidating said school districts shall be contingent on the Common Council of the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the

ordinance providing for the Juneau Independent School District retail sales and services tax."

2. At the meeting above referred to, there was presented to the Council for its consideration a petition signed by some 222 "residents and taxpayers of the City of Douglas," in which it is requested that the "City Council not * * * amend its sales tax ordinance." This petition, consisting of six pages, is attached hereto.

I should also advise you that on January 10, 1955, there was passed by the Common Council and approved by the Mayor Resolution No. 201 of the City of Douglas, in which it was resolved that said Common Council would amend Section 11 of its sales and services tax ordinance "as soon as possible after such consolidation has been adjudged." I believe that a certified copy of such Resolution is contained in the file in the above-entitled matter.

3. As soon as the Common Council of the City of Douglas is able to obtain a quorum at some subsequent regular or special meeting, a decision will be made as to whether or not it will amend its sales and services tax ordinance pursuant to Resolution No. 201.

Very truly yours,

/s/ JOHN H. DIMOND,
Attorney for City of Douglas.

JHD:GC
cc: R. Boochever
M. E. Monagle

[To the Common Council of the City of Douglas:

[We the undersigned, being residents and taxpayers of the City of Douglas, do hereby petition the City Council not to amend its sales tax ordinance. Here follows signatures totaling 222.]

[Endorsed]: Filed March 15, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF POSTING

United States of America,
Territory of Alaska—ss.

I, Elwin B. Dell, being first duly sworn on oath, depose and say:

That on the 26th day of January, 1955, I posted a true, full and correct copy of the order calling for election in the matter of the consolidation of the Juneau Independent School District and the Douglas Independent School District, to be known as the Juneau-Douglas Independent School District, which order is dated January 21, 1955, at three public places within the Juneau Independent School District, namely: one, at DeHart's Grocery Store at Auke Bay, Alaska; two, at the front entrance of the Federal Building, Juneau, Alaska; and, third, at the front entrance of the Juneau City Hall, Juneau, Alaska.

On said date, I did further post true, full and correct copies of said order at the following locations

in the Douglas Independent School District, to wit: One, at the West Juneau Grocery Store at West Juneau, Alaska; two, at the front entrance of the Douglas City Hall, Douglas, Alaska; and, three, at the front entrance of the United States Post Office at Douglas, Alaska.

I do further certify that said notices remained posted until March 9, 1955.

/s/ ELWIN B. DELL.

Subscribed and sworn to before me this 11th day of March, 1955.

[Seal] /s/ KATHRYN ADAMS,
Notary Public for Alaska.

My commission expires: May 15, 1956.

[Endorsed]: Filed March 15, 1955.

FILING OF CANDIDACY

I hereby certify that I am a citizen of the United States of America; twenty-one years of age or over; an actual and bona fide resident of Alaska, and have been such a resident continuously during the entire year immediately preceding March 8, 1955, and have been a resident in either the Juneau or the Douglas Independent School District for thirty days next preceding March 8, 1955; and am able to read and write the English language as prescribed by an Act of the United States Congress on March 3, 1927, entitled "An act to prescribe certain qualifications

of voters in the Territory of Alaska and for other purposes."

I further certify that I am not a member of the Communist Party or any subversive parties or affiliated with any such party; that I do not believe in, am not a member of, nor do I support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional method; that I will defend and support the Constitution of the United States of America, uphold the laws of the Territory of Alaska, and the ordinances of the Juneau-Douglas Independent School District.

I hereby file my name and request same to be placed on the official ballot of the School Board election of the Juneau-Douglas Independent School District to be held on March 8, 1955.

Signature of Candidate:

/s/ CHARLES H. JONES,
Douglas, Alaska.

[Here follows 7 identical Filing of Candidacy signed by: Pat Ellsworth, Matt K. Gormley, J. S. MacKinnon, Jr., John G. Hagmeier, James P. Orme, Curtis G. Shattuck, and F. Dewey Baker.]

[Endorsed]: Filed March 23, 1955.

In the District Court for the District of Alaska.
Division Number One, at Juneau

In the Matter of
The Consolidation of the JUNEAU INDEPENDENT SCHOOL DISTRICT and the DOUGLAS INDEPENDENT SCHOOL DISTRICT to Be Known as JUNEAU-DOUGLAS INDEPENDENT SCHOOL DISTRICT

ORDER ESTABLISHING JUNEAU-DOUGLAS INDEPENDENT SCHOOL DISTRICT

It appearing to the Court from the records and file herein that an election was held within the area comprising the Juneau Independent School District and the area comprising Douglas Independent School District on March 8, 1955, for the purpose of determining whether the voters in said school districts desire a consolidation of said school districts and for the further purpose of electing five members of the Board of Directors of the consolidated school district to govern school matters within said consolidated school district, and

It further appearing that all the requirements of Chapter 93, SLA 1953 have been complied with with respect to such election and that at said election the results of the balloting in the Juneau Independent School District were as follows:

For consolidation	702
Against consolidation	239
Number of ballots rejected	9
Number of ballots cast	950

and that in the Douglas Independent School District the results of balloting were as follows:

For consolidation	274
Against consolidation	209
Number of ballots rejected	6
Number of ballots cast	489

and that the five persons receiving the highest number of votes to the school Board and the number of votes received by each of them were as follows:

F. Dewey Baker	857
Matt K. Gormley	822
John G. Hagmeier	794
James P. Orme	847
Curtis G. Shattuck	838

Now Therefor, It Is Hereby Ordered, Adjudged and Decreed That the Juneau Independent School District and the Douglas Independent School District be and the same are hereby consolidated and that the area hereinafter described shall be known as the Juneau-Douglas Independent School District. The area so consolidated is bounded and particularly described, to wit:

> "Beginning at a point in the center of the Juneau-Douglas bridge spanning Gastineau Channel, running thence N. 45 deg. W. 4.59 miles to a point in Gastineau Channel; thence W. 1.72 miles to a point in Gastineau Channel; thence S. 65 deg. W. 3.73 miles to a point lying in a southerly direction from Spuhn Island from which point the center of the Juneau-Douglas bridge bears S. 63 deg. E. 11.10 miles;

thence N. 45 deg. E. 2.00 miles; thence N. 63 deg. 00 min. W. 3.30 miles to a point north of Portland Island; thence N. 22 deg. 00 min. W. 25.17 miles to a point lying northwesterly of Benjamin Island; thence N. 68 deg. 00 min. W. 4.50 miles to a point; thence S. 34 deg. 30 min. E. 14.10 miles to a point on Mt. McGinnis; thence S. 54 deg. 00 min. E. 13.41 miles to a point on Mt. Olds; thence S. 30 deg. 40 min. E. 6.61 miles to a point; thence S. 43 deg. 00 min. W. 3.14 miles through Corner No. 4 of U. S. Survey No. 328 to a point in Gastineau Channel; thence No. 47 deg. 00 min. W. 8.03 miles to the center point of the Juneau-Douglas bridge, the point of beginning; containing 202 square miles, more or less.

and

"Beginning at a point in the center of the Juneau - Douglas bridge spanning Gastineau Channel, thence N. 45 deg. W. 4.95 miles to a point in the Gastineau Channel; thence W. 1.72 miles to a point in Gastineau Channel southeast of Juneau; thence S. 65 deg. W. 3.73 miles to a point south of Spuhn Island; thence N. 63 deg. W. 3.30 miles to a point north of Portland Island; thence S. 52 deg. 30 min. E. 0.76 miles to a point northwest of Portland Island; thence S. 34 deg. 40 min. E. 9.96 miles to a point in Stephens Passage west of Douglas Island; thence S. 77 deg. 30 min. E. 13.2 miles to a point in Stephens Passage south of Marmion Island;

thence N. 37 deg. 20 min. E. 1.54 miles to a point in Gastineau Channel in direct line between Marmion Island and Point Bishop; thence N. 47 deg. W. 10.04 miles to the center of the Juneau - Douglas bridge, the point of beginning," containing 95.2 square miles, more or less;

It Is Further Adjudged and Decreed that the following persons have been duly elected as Directors of the School Board or Board of Directors of the Juneau-Douglas Independent School District to serve until their successors are duly elected and qualified: F. Dewey Baker, Matt K. Gormley, John G. Hagmeier, James P. Orme, Curtis G. Shattuck;

It Is Further Ordered, Adjudged and Decreed That the Juneau-Douglas Independent School District is granted full power and authority to exercise the powers granted by law to such consolidated school districts under the provisions of Chapter 93, SLA, 1953, and other applicable laws of Alaska and pursuant to its own ordinances, providing that the ordinances of the larger of the independent or incorporated school districts, according to the number of registered voters in the last election held therein, so consolidated shall be in effect upon the effective date of this order;

It Is Further Ordered, Adjudged and Decreed That all assets of each of the independent school districts shall become the property of the consolidated school district and all the liabilities of each of the independent school districts shall become the

liabilities of the consolidated school district upon the effective date of this order;

It Is Further Ordered that the members of the School Board or Board of Directors above mentioned shall severally take an oath in writing to faithfully and honestly discharge the duties of their office and file the same with the Clerk of this Court before entering upon the discharge of their duties;

It Is Further Ordered, Adjudged and Decreed That the effective date of this Order shall be April 1, 1955.

Done in open court this 18th day of March, 1955.

/s/ GEORGE W. FOLTA,
Judge.

Telegram

Official Business—Government Rates

Night Letter

March 18, 1955.

From: Geo. W. Folta, District Judge, Anchorage, Alaska.

To: J. W. Leivers, Clerk of Court, Juneau, Alaska.

Have signed order establishing the Juneau-Douglas Independent School District. Order mailed today. Notify Boochever.

[Endorsed]: Filed March 22, 1955.

[Title of District Court and Cause.]

PETITION FOR LEAVE TO APPEAR BY MOTION AND FOR AN ORDER TO ALTER AND AMEND THE JUDGMENT AND ORDER HEREIN AND FOR NEW TRIAL AND HEARING

Robert S. Schy and Lois Lane, both permanent residents and inhabitants, qualified electors and taxpayers within the boundaries of the Douglas Independent School District, either within or without the boundaries of the Municipality of Douglas, Alaska, and signers of and parties to the petition hereto attached and made a part hereof the same as though herein specifically set forth, and further petition this Honorable Court for leave to appear herein by this motion, and for the Court's consideration and granting of this Motion, whereby movants move that that certain Order, Judgment and Decree made and entered herein on March 18, 1955, consolidating the Juneau Independent School District and the Douglas Independent School District as the Juneau-Douglas Independent School District, be vacated and set aside or altered or amended, or that a new trial be granted and movants authorized to appear and defend on their own behalf and on behalf of all persons similarly situated, and all persons who have signed the attached petition; and, in support of this motion state:

1. That the Notices of election and the ballots used at the election of March 8, 1955, in accordance

with the order of the above-entitled Court dated January 21st, 1955, presented the following proposal to electors at said election, to wit:

Proposal

Shall the Juneau Independent School District and the Douglas Independent School District be consolidated under the name of Juneau-Douglas Independent School District, in which event the ordinances of the Juneau Independent School District, being the larger of said school districts according to the number of registered voters at the last general election held therein, shall be in effect in such consolidated school district, including the ordinances providing for a 1% tax on retail sales and services, which tax shall automatically become effective in that portion of the Douglas Independent School District located beyond the corporate limits of the City of Douglas, Alaska, upon entry of an order by the District Court consolidating said school districts. In the event of the approval of this proposal by a majority of the voters of each of said school districts, the order consolidating said school districts shall be contingent on the Common Council of the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax.

☐—For Consolidation

☐—Against Consolidation

2. That the Common Council of the City of Douglas, Alaska, has not amended its 2% retail sales and service tax ordinance so that one-half of the revenue thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District Retail Sales and Service tax as provided for in the Notice of election and the Official ballot of election of March 8, 1955, but on the contrary, the municipal council of the City of Douglas, Alaska, at a regular meeting held on March 18, 1955, voted in opposition and against amending its sales tax ordinance so as to conform to the proposition or proposal so presented to the voters in the notice of election and on the ballots at said election on said consolidation question on March 8, 1955.

3. That there are only six members of the Common Council of the Municipality of Douglas, Alaska, which is situated within the boundaries of the Douglas Independent School District, and if there is a tie in any vote on any proposition before said Council requiring a vote to be taken the Mayor of said Municipality has the right to cast the deciding vote. That three members of the Common Council and the Mayor of the Municipal Corporation of Douglas, Alaska, are movants herein and have refused to vote and will not vote to amend its 2% retail sales and service tax ordinance, and therefore said Douglas retail sales and service tax cannot be amended so that one-half of the revenue thereof shall be used exclusively for the purpose set forth

in the ordinance providing for the Juneau Independent School District Retail sales and service tax.

4. That it would be illegal for the Common Council of the City of Douglas, Alaska, to amend its 2% retail sales and service tax ordinance without a vote of the residents within the municipality of Douglas, Alaska, for the reason that Chapter 28, Session Laws of Alaska, 1949, provides as follows:

> "It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with the consent of the voters at another referendum."

and Chapter 121, Session Laws of Alaska, 1953, also contains these exact words, and therefore, even if the common council of the City of Douglas, Alaska, attempted to amend its 2% retail sales and service tax in order to comply with the contingency set forth in the Notice of Election and in the ballots at said election of March 8, 1955, said action would be illegal and contrary to law since the voters of the municipality of Douglas, Alaska, did not authorize the levy and collection of the sales tax to be used for school purposes or for the construction of or maintenance of any school outside of the incorporated limits of the City of Douglas, Alaska.

5. That there is no legal ordinance in effect in the Municipal Corporation of Juneau, Alaska, or in the Juneau Independent School District, legally providing for a 1% tax on sales and services. There

is an ordinance that purports to levy a sales tax on retail sales and services, and also an ordinance that purports to amend the City of Juneau Sales Tax Ordinance No. 338 to include a sales tax on "Rents," but neither said Ordinance No. 338 nor Ordinance No. 369 of the City of Juneau, Alaska, are legal or of any binding effect on the residents of Juneau, Alaska, or Juneau Independent School District.

6. That a majority of the residents and inhabitants of the Municipal Corporation of Douglas, Alaska, voted against consolidation of the Juneau Independent School District and Douglas Independent School District, and a majority of the residents of Douglas, Alaska, are opposed to being required to contribute retail sales, service, and rental taxes collected wholly within the limits of the municipality of Douglas, Alaska, towards the construction of school buildings or for any other purpose outside of the limits of the corporate boundaries of said municipality.

7. That a great many of the petitioners who signed their names to the attached petition voted "For Consolidation" after they were persuaded by mis-statements and misrepresentations that it would be to the advantage of the children and also the residents of the Douglas Independent School District for the Juneau and Douglas Independent School Districts to be consolidated. One material misrepresentation or misleading statement was that no taxes were paid to the Douglas Independent

School District by the Cedar Park Housing Project. While this statement was probably true it was misleading in that Cedar Park Housing Project does not pay taxes as such, but in fact pays an amount equal to taxes, but "in lieu of taxes." Another statement which was made by a Territorial School Official that influenced some of your petitioners to vote in favor of consolidation, and which was very misleading was the statement that the Harborview school in the Juneau Independent School District was being paid for by collections from the Tobacco Tax. From information obtained since the election of March 8, 1955, your petitioners are informed and believe and therefore allege that said statement so made by a Territorial School Official was and is untrue and was made for the sole purpose of misleading the voters and your petitioners in order to get them to vote in favor of the consolidation of the Juneau and Douglas Independent School Districts. The Officials of the Schools also convinced some of the electors to vote in favor of consolidation of the two school districts by stating that by consolidating the two school districts that two less school teachers would be required and that this would save the School Districts the sum of $10,000.00. Your petitioners have since learned that this statement was not true, and that the total cash cost to the School District of having the two teachers was only $2,000.00, and that the balance of their wages was paid by contribution from the Territory of Alaska.

8. For further reasons to be shown to the Court at the time of the hearing of this motion.

Dated at Juneau, Alaska, this 28th day of March, 1955.

ROBERTSON, MONAGLE & EASTAUGH.

By /s/ M. E. MONAGLE,
Attorney for Movants.

We, being residents and taxpayers of the Douglas School District pray the District Court to Rescind action on Consolidation of the Juneau and Douglas School Districts, due to misleading information received prior to and during the consolidation election.

[Here follows 290 signatures.]

Receipt of copy acknowledged.

[Endorsed]: Filed March 28, 1955.

[Title of District Court and Cause.]

PETITION FOR LEAVE TO APPEAR BY MOTION AND FOR AN ORDER TO ALTER AND AMEND THE JUDGMENT AND ORDER HEREIN AND FOR NEW TRIAL AND HEARING

William Richards, Clancy Henkins, Joseph L. Riedi, and Marvin Barkdoll, all permanent residents and inhabitants, qualified electors, property owners and taxpayers of the Municipal Corpora-

tion of Douglas, Alaska, appear herein for themselves and for all other permanent residents and inhabitants who are qualified electors, property owners and taxpayers within said municipality of Douglas, Alaska, who are parties to the petition signed by some 222 residents of Douglas, Alaska, and heretofore filed in the above-entitled Court and Cause, and petition the above Honorable Court for leave to appear herein by this motion, and for the Court's consideration and granting of this Motion, whereby Movants move that that certain Order, Judgment and Decree made and entered herein on March 18, 1955, consolidating the Juneau Independent School District and the Douglas Independent School District as the Juneau-Douglas Independent School District, be vacated and set aside, or altered or amended, or that a new trial be granted and Movants authorized to appear and defend on their own behalf and on behalf of all other persons similarly situated; and, in support of this motion state:

1. That the Notices of election and the ballots used at the election of March 8, 1955, in accordance with the order of the above-entitled Court dated January 21st, 1955, presented the following proposal to electors at said election, to wit:

Proposal

Shall the Juneau Independent School District and the Douglas Independent School District be consolidated under the name of Juneau-Douglas Independent School District, in which event the ordinances of the Juneau Independent School District, being the larger of said school districts according to the num-

ber of registered voters at the last general election held therein, shall be in effect in such consolidated school district, including the ordinances providing for a 1% tax on retail sales and services, which tax shall automatically become effective in that portion of the Douglas Independent School District located beyond the corporate limits of the City of Douglas, Alaska, upon entry of an order by the District Court consolidating said school districts. In the event of the approval of this proposal by a majority of the voters of each of said school districts, the order consolidating said school districts shall be contingent on the Common Council of the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax.

☐—For Consolidation

☐—Against Consolidation

2. That the Common Council of the City of Douglas, Alaska, has not amended its 2% retail sales and service tax ordinance so that one-half of the revenue thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District Retail Sales and Service tax as provided for in the Notice of election and the Official ballot of election of March 8, 1955, but on the contrary, the municipal council of the City of Douglas, Alaska, at a regular meeting held on March 18, 1955, voted in opposition and against amending its sales tax ordinance so as

to conform to the proposition or proposal so presented to the voters in the notice of election and on the ballots at said election on said consolidation question on March 8, 1955.

3. That there are only six members of the Common Council of the Municipality of Douglas, Alaska, which is situated within the boundaries of the Douglas Independent School District, and if there is a tie in any vote on any proposition before said Council requiring a vote to be taken the Mayor of said Municipality has the right to cast the deciding vote. That three members of the Common Council and the Mayor of the Municipal Corporation of Douglas, Alaska, are movants herein and have refused to vote and will not vote to amend its 2% retail sales and service tax ordinance, and therefore said Douglas retail sales and service tax cannot be amended so that one-half of the revenue thereof shall be used exclusively for the purpose set forth in the ordinance providing for the Juneau Independent School District Retail sales and service tax.

4. That it would be illegal for the Common Council of the City of Douglas, Alaska, to amend its 2% retail sales and service tax ordinance without a vote of the residents within the municipality of Douglas, Alaska, for the reason that Chapter 28, Session Laws of Alaska 1949, provides as follows:

> "It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with the consent of the voters at another referendum."

and Chapter 121, Session Laws of Alaska, 1953, also contains these exact words, and therefore, even if the common council of the City of Douglas, Alaska, attempted to amend its 2% retail sales and service tax in order to comply with the contingency set forth in the Notice of Election and in the ballots at said election of March 8, 1955, said action would be illegal and contrary to law since the voters of the municipality of Douglas, Alaska, did not authorize the levy and collection of the sales tax to be used for school purposes or for the construction of or maintenance of any school outside of the incorporated limits of the City of Douglas, Alaska.

5. That there is no legal ordinance in effect in the Municipal Corporation of Juneau, Alaska, or in the Juneau Independent School District, legally providing for a 1% tax on sales and services. There is an ordinance that purports to levy a sales tax on retail sales and services, and also an ordinance that purports to amend the City of Juneau Sales Tax Ordinance No. 338 to include a sales tax on "Rents," but neither said Ordinance No. 338 nor Ordinance No. 369 of the City of Juneau, Alaska, are legal or of any binding effect on the residents of Juneau, Alaska, or Juneau Independent School District.

6. That a majority of the residents and inhabitants of the Municipal Corporation of Douglas, Alaska, voted against consolidation of the Juneau Independent School District and Douglas Independent School District, and a majority of the residents of Douglas, Alaska, are opposed to being required

to contribute retail sales, service, and rental taxes collected wholly within the limits of the municipality of Douglas, Alaska, towards the construction of school buildings or for any other purpose outside of the limits of the corporate boundaries of said municipality.

7. That Chapter 93, Session Laws of Alaska, 1953, under which said election of March 8, 1955, was held and the law under which the Honorable Court's Order of March 18, 1955, was entered attempts to authorize the residents outside of a Municipality to determine by ballot whether the residents within a Municipality shall be consolidated with a school district in which another Municipality is situated, and attempts to deprive the Citizens of Douglas, Alaska, of the right to govern themselves, by providing that the Ordinances of Juneau Independent School District will govern within the boundaries of the Townsite and Municipality of Douglas, Alaska.

8. That Chapter 93, Session Laws of Alaska, 1953, is also unconstitutional in that it attempts to deprive Movants and all other residents and inhabitants of the Municipality of Douglas, Alaska, of their property without due process of law, and attempts to deprive the Municipal Corporation of Douglas, Alaska, of its property without due process of law.

9. That Chapter 93, Session Laws of Alaska, 1953, under the terms and conditions of which said

election of March 8, 1955, was held is also unconstitutional for the reason that it provides that the residents and inhabitants of the Municipal Corporation of Douglas, Alaska, shall hereafter be governed by the Ordinances in effect in the Juneau Independent School District, and deprives the inhabitants of Douglas, Alaska, of the exclusive right to govern themselves.

10. For further reasons to be shown to the Court at the time of the hearing of this motion.

Dated at Juneau, Alaska, this 28th day of March, 1955.

ROBERTSON, MONAGLE & ESTAUGH,

By /s/ M. E. MONAGLE,
Attorney for Movants.

Receipt of copy acknowledged.

[Endorsed]: Filed March 28, 1955.

OATH OF DIRECTOR

United States of America,
Territory of Alaska.

I, John G. Hagmeier, do solemnly swear that I will faithfully and honestly perform all the duties devolving upon me as a member of the Board of Directors of the Juneau-Douglas Independent

School District, to which office I was elected on March 8, 1955.

/s/ JOHN G. HAGMEIER.

Subscribed and sworn to before me this 1st day of April, 1955.

[Seal] /s/ R. BOOCHEVER,
Notary Public for Alaska.

My commission expires: November 7, 1955.

[Here follows Oath of Director signatures of: James P. Orme, Curtis G. Shattuck, F. Dewey Baker and Matt K. Gormley.]

[Endorsed]: Filed April 1, 1955.

[Title of District Court and Cause.]

MINUTE ENTRY—APRIL 22, 1955

This case came on for hearing arguments on two Petitions for leave to appear to alter and amend Judgment. Robert Boochever appeared in behalf of the School Boards; M. E. Monagle for the Petitioners. Counsel argued the matter following which the court took the question under advisement.

[Title of District Court and Cause.]

MINUTE ENTRY—APRIL 23, 1955

The court having heard arguments on the petitions filed which asked to Alter and Amend the Order of Consolidation, at this time ruled that the petitions would be denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS UNDER RULE 73 (b)

Notice Is Hereby Given that Robert S. Schy and Lois Lane, petitioners for leave to appear by motion and for an order to alter and amend the Judgment and Decree entered in the above-entitled case on March 18, 1955, and for a new trial and hearing, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain Judgment and Decree made and entered in the above-entitled action on March 18, 1955, and that certain Final Order filed in this action on April 23, 1955, denying their petition and motion for leave to appear by motion and for an order to alter and amend said Judgment and Decree of March 18, 1955, and for a new trial and hearing.

Dated at Juneau, Alaska, this 20th day of May, 1955.

ROBERTSON, MONAGLE & EASTAUGH,

Attorneys for Appellants Robert S. Schy and Lois Lane,

By /s/ M. E. MONAGLE.

Receipt of copy acknowledged.

[Endorsed]: Filed May 21, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS UNDER RULE 73(b)

Notice Is Hereby Given that William Richards, Clancy Henkins and Joseph L. Riedi, petitioners for leave to appear by motion and for an order to alter and amend the Judgment and Decree entered in the above-entitled case on March 18, 1955, and for a new trial and hearing, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain Judgment and Decree made and entered in the above-entitled action on March 18, 1955, and that certain Final Order filed in this action on April 23, 1955, denying their petition and motion for leave to appear by motion and for an order to alter and amend said Judgment and Decree of March 18, 1955, and for a new trial and hearing.

Dated at Juneau, Alaska, this 20th day of May, 1955.

ROBERTSON, MONAGLE & EASTAUGH,

Attorneys for Appellants William Richards, Clancy Hankins and Joseph L. Riedi.

By /s/ M. E. MONAGLE.

Receipt of copy acknowledged.

[Endorsed]: Filed May 21, 1955.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, Robert S. Schy and Lois Lane, the petitioners in the above proceedings, have appealed to the United States Court of Appeals for the Ninth Circuit, from that certain Judgment and Decree entered in the above-entitled case on March 18, 1955, wherein and whereby in the above proceedings the District Court for the Territory of Alaska, First Judicial Division, at Juneau, Alaska, ordered Juneau Independent School District and Douglas Independent School District consolidated as the Juneau-Douglas Independent School District, and from that certain Order, made and entered in said proceedings on April 23, 1955, denying the petition of said Robert S. Schy and Lois Lane for leave to appear by motion and for an order to alter and amend the Judgment and Decree entered herein on March 18, 1955, and for a new trial and hearing;

Whereas, said petitioners and appellants and their sureties have appeared herein and submitted to the jurisdiction of the Court and have undertaken to make good and pay all taxable costs and charges, not exceeding the sum of Two Hundred Fifty ($250.00) Dollars that the appellees may be put to or allowed if said appeal is dismissed or the Judgment affirmed, or such costs as the Appellate Court may award if the Judgment is modified;

Now, Therefore, in consideration of the premises and such appeal, we, Robert S. Schy and Lois Lane, petitioners and appellants herein, as principals, and

Clancy Henkins and Joseph L. Riedi, as sureties, do hereby jointly and severally undertake and promise, and acknowledge ourselves bound in the sum of Two Hundred Fifty ($250.00) Dollars that the petitioners and appellants, Robert S. Schy and Lois Lane, will satisfy in full and pay and make good all taxable costs and charges not exceeding the sum of $250.00 that the appellees may be put to or allowed if the appeal is dismissed or the Judgment affirmed, or such costs as the Appellate Court may award if the Judgment is modified.

In Witness Whereof, the parties to this undertaking and bond have hereto set their respective hands and seals at Juneau, Alaska, this 20th day of May, 1955.

[Seal] /s/ ROBERT S. SCHY,
Principal.

[Seal] /s/ LOIS LANE,
Principal.

[Seal] /s/ CLANCY HENKINS,
Surety.

[Seal] /s/ JOSEPH L. RIEDI,
Surety.

Executed in the presence of:

/s/ M. E. MONAGLE,
/s/ F. O. EASTAUGH,
/s/ M. E. MONAGLE,
/s/ F. O. EASTAUGH,

United States of America,
Territory of Alaska—ss.

Clancy Henkins and Joseph L. Riedi, being first duly sworn, each for himself and not one for the other, deposes and says: That I am a resident of the Territory of Alaska; that I am not a counselor or attorney at law; that I am not a marshal, deputy marshal, commissioner, clerk of any court or other officer of any court; that I am worth the sum of Five Hundred ($500.00) Dollars over and above all my debts and liabilities and exclusive of property exempt from execution.

/s/ CLANCY HENKINS,

/s/ JOSEPH L. RIEDI.

Subscribed and Sworn to before me at Juneau, Alaska, this 20th day of May, 1955.

[Seal] /s/ M. E. MONAGLE,
Notary Public for Alaska.

My commission expires: March 1, 1958.

Receipt of copy acknowledged.

[Endorsed]: Filed May 21, 1955.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, William Richards, Clancy Henkins and Joseph L. Riedi, the petitioners in the above proceedings, have appealed to the United States Court of Appeals for the Ninth Circuit, from that certain Judgment and Decree entered in the above-entitled case on March 18, 1955, wherein and whereby in the above proceedings the District Court for the Territory of Alaska, First Judicial Division, at Juneau, Alaska, ordered Juneau Independent School District and Douglas Independent School District consolidated as the Juneau-Douglas Independent School District, and from that certain Order, made and entered in said proceedings on April 23, 1955, denying the petition of said William Richards, Clancy Henkins and Joseph L. Riedi for leave to appear by motion and for an order to alter and amend the Judgment and Decree entered herein on March 18, 1955, and for a new trial and hearing;

Whereas, said petitioners and appellants and their sureties have appeared herein and submitted to the jurisdiction of the Court and have undertaken to make good and pay all taxable costs and charges, not exceeding the sum of Two Hundred Fifty ($250.00) Dollars that the appellees may be put to or allowed if said appeal is dismissed or the Judgment affirmed, or such costs as the Appellate Court may award if the Judgment is modified;

Now, Therefore, in consideration of the premises

and such appeal, we, William Richards, Clancy Henkins and Joseph L. Riedi, petitioners and appellants herein, as principals, and Robert S. Schy and William Boehl, as sureties, do hereby jointly and severally undertake and promise, and acknowledge ourselves bound in the sum of Two Hundred Fifty ($250.00) Dollars that the petitioners and appellants, William Richards, Clancy Henkins and Joseph L. Riedi, will satisfy in full and pay and make good all taxable costs and charges not exceeding the sum of $250.00 that the appellees may be put to or allowed if the appeal is dismissed or the Judgment affirmed, or such costs as the Appellate Court may award if the Judgment is modified.

In Witness Whereof, the parties to this undertaking and bond have hereunto set their respective hands and seals at Juneau, Alaska, this 20th day of May, 1955.

[Seal] /s/ CLANCY HENKINS,
Principal.

[Seal] /s/ JOSEPH L. RIEDI,
Principal.

[Seal] /s/ LAWRENCE W. RICHARDS,
Principal.

[Seal] /s/ ROBERT S. SCHY,
Surety.

[Seal] /s/ WILLIAM BOEHL,
Surety.

Executed in the presence of:

/s/ M. E. MONAGLE,

/s/ F. O. EASTAUGH,

/s/ M. E. MONAGLE,

/s/ F. O. EASTAUGH,

United States of America,
Territory of Alaska—ss.

Robert S. Schy and William Boehl, being first duly sworn, each for himself and not one for the other, deposes and says: That I am a resident of the Territory of Alaska; that I am not a counselor or attorney at law; that I am not a marshal, deputy marshal, commissioner, clerk of any court or other officer of any court; that I am worth the sum of Five Hundred ($500.00) Dollars over and above all my debts and liabilities and exclusive of property exempt from execution.

/s/ ROBERT S. SCHY,

/s/ WILLIAM BOEHL.

Subscribed and Sworn to before me at Juneau, Alaska, this 20th day of May, 1955.

[Seal] /s/ M. E. MONAGLE,
Notary Public for Alaska.

My commission expires: March 1, 1958.

Receipt of copy acknowledged.

[Endorsed]: Filed May 21, 1955.

[Title of District Court and Cause.]

MOTION TO EXTEND TIME TO DOCKET RECORD ON APPEAL

Petitioners and appellants, William Richards, Clancy Henkins, and Joseph L. Riedi, move the Court for an Order extending the time for docketing the record on appeal in this action so as to allow said petitioners and appellants up to and including August 18, 1955, to file the record on appeal and docket the same in the United States Court of Appeals for the Ninth Circuit.

Dated at Juneau, Alaska, this 20th day of June, 1955.

ROBERTSON, MONAGLE & EASTAUGH,
Attorneys for Petitioners and Appellants;

By /s/ M. E. MONAGLE,
Of Attorneys.

[Here follows an identical motion by Robert S. Schy and Lois Lane.]

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1955.

[Title of District Court and Cause.]

ORDER

This matter came on this day to be heard before the Court at Anchorage, Alaska, on the motion of petitioners and appellants, Robert S. Schy and Lois Lane, for an order extending the time for docketing the record on appeal in this action.

It is hereby Ordered:

That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit in this action is extended to and including August 15, 1955.

Dated at Anchorage, Alaska, this 21st day of June, 1955.

/s/ JOHN L. McCARRY, JR.,
District Judge.

Approved:

/s/ N. C. BANFIELD,
Attorney for Respondent.

[Endorsed]: Filed and entered June 21, 1955.

[Title of District Court and Cause.]

ORDER

This matter came on this day to be heard before the Court at Anchorage, Alaska, on the motion of petitioners and appellants, William Richards, Clancy Henkins and Joseph L. Riedi, for an order

extending the time for docketing the record on appeal in this action.

It is hereby Ordered:

That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit in this action is extended to and including August 15, 1955.

Dated at Anchorage, Alaska, this 21st day of June, 1955.

/s/ JOHN L. McCARRY, JR.,
District Judge.

Approved:

/s/ N. C. BANFIELD,
Attorney for Respondent.

[Endorsed]: Filed and entered June 21, 1955.

[Title of District Court and Cause.]

MINUTE ENTRY—JUNE 21, 1955

Upon the filing of a Motion to Extend time to Docket Record on Appeal by William Richards, Clancy Henkins, Joseph L. Riedi, Robert S. Schy and Lois Lane, the Court at this time signed Orders extending the time for docketing the record on appeal for the Ninth Circuit to and including August 15, 1955.

[Title of District Court and Cause.]

PRAECIPE FOR APPEAL RECORD

To J. W. Leivers, Clerk of the Above Court:

Kindly promptly prepare and certify under your official seal, for inclusion in the record on appeal, the above Court's complete record, including all docket entries, and all the proceedings and evidence in the above action, and promptly forward the same to the Honorable United States Court of Appeals for the Ninth Circuit.

Dated at Juneau, Alaska, this 10th day of August, 1955.

ROBERTSON, MONAGLE & EASTAUGH,
Attorneys for Appellants.

By /s/ M. E. MONAGLE,
Of Attorneys.

Receipt of copy acknowledged.

[Endorsed]: Filed August 11, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANTS

Appellants propose on their Appeal to the United States Circuit Court of Appeals in the above Cause to rely upon the following points as error:

1. The Trial Court erred in making and entering

its Order of March 18, 1955, establishing Juneau-Douglas Independent School District.

2. The Trial Court erred in refusing to grant the petition of Appellants, Robert S. Schy and Lois Lane, the right to appear herein and in refusing to alter and amend the Order of Consolidation—established Juneau-Douglas Independent School District —and in refusing to grant them a new trial and hearing.

3. The Court erred in not granting Robert S. Schy and Lois Lane and other inhabitants, qualified electors and taxpayers a fair and impartial trial or hearing and did not accord them the process of law or a fair opportunity to present their evidence in opposition to the consolidation of Juneau Independent School District and Douglas Independent School District to be known as Juneau-Douglas Independent School District.

4. The Trial Court erred in refusing to alter and amend its Judgment and Order entered herein on March 18, 1955, establishing the Juneau-Douglas Independent School District.

5. The Trial Court erred in entering its Minute Order of April 23, 1955, denying Appellants' Petition for leave to Appeal and for an Order to alter and amend the Judgment and Order of said Court entered on March 18, 1955, and denying the Petition of Appellants for a new trial and hearing.

Dated at Juneau, Alaska, this 10th day of August, 1955.

ROBERTSON, MONAGLE & EASTAUGH,
Attorneys for Robert S. Schy and Lois Lane.

By /s/ M. E. MONAGLE,
Of Attorneys.

Receipt of copy acknowledged.
[Endorsed]: Filed August 11, 1955.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Territory of Alaska,
First Division—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and all Orders of the Court filed in the above-entitled cause, and constitutes the entire file in said cause as designated by the Appellant to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 11th day of August, 1955.

[Seal] /s/ J. W. LEIVERS,
Clerk of District Court.

[Endorsed]: No. 14856. United States Court of Appeals for the Ninth Circuit. William Richards, Clancy Henkins, Joseph L. Riedi, Robert S. Schy and Lois Lane, Appellants, vs. Juneau Independent School District and Douglas Independent School District, to be known as Juneau-Douglas Independent School District, Appellees. Transcript of Record. Appeals from the District Court for the District of Alaska, Division No. 1.

Filed August 15, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14856

WILLIAM RICHARDS, CLANCY HENKINS, and JOSEPH L. RIEDI,

Appellants.

vs.

JUNEAU INDEPENDENT SCHOOL DISTRICT and the DOUGLAS INDEPENDENT SCHOOL DISTRICT, to Be Known as JUNEAU-DOUGLAS INDEPENDENT SCHOOL DISTRICT,

Appellees.

APPELLANTS' STATEMENT OF POINTS

Appellants propose on their Appeal to the United States Court of Appeals for the Ninth Circuit in the above Cause to rely upon the following points as error:

1. Under the laws of the Territory of Alaska authorizing the consolidating of two or more independent or incorporated school districts (Chapter 93, Session Laws of Alaska 1953), a printed or typewritten copy of the Order of the Judge of the District Court must be posted in at least three public places for at least thirty days prior to the day of election as required by said law, and the trial Court erred in not requiring that the proposal set forth on the election ballot used in said school district elec-

In the United States Court of Appeals
for the Ninth Circuit

No. 14856

ROBERT S. SCHY, LOIS LANE, WILLIAM RICHARDS, CLANCY HENKINS, and JOSEPH L. RIEDI,

Appellants,

vs.

JUNEAU INDEPENDENT SCHOOL DISTRICT and the DOUGLAS INDEPENDENT SCHOOL DISTRICT, to Be Known as JUNEAU-DOUGLAS INDEPENDENT SCHOOL DISTRICT,

Appellees.

PETITION FOR CONSOLIDATION OF APPEALS

Come now Appellants Robert S. Schy and Lois Lane, two of the Appellants herein, together with William Richards, Clancy Henkins and Joseph L. Riedi, three additional appellants herein, and jointly petition this Court for an Order consolidating their respective appeals, which were instituted in the above-entitled matter by their Notice of Appeal in the District Court for the Territory of Alaska, Division Number One, at Juneau, Alaska, dated May 20, 1955.

Dated at Juneau, Alaska, this 11th day of August, 1955.

Respectfully submitted,

ROBERTSON, MONAGLE & EASTAUGH,

Attorneys for Robert S. Schy, Lois Lane, William Richards, Clancy Henkins, and Joseph L. Riedi, Appellants herein,

By /s/ M. E. MONAGLE,
Of Attorneys.

[Title of Court of Appeals and Cause.]

STIPULATION FOR CONSOLIDATION OF APPEALS

It Is Hereby Stipulated by and between Robert Boochever, attorney for Juneau Independent School District and Douglas Independent School District, known as Juneau-Douglas Independent School District, and M. E. Monagle, attorney for Appellants Robert S. Schy, Lois Lane, William Richards, Clancy Henkins, and Joseph L. Riedi, in the above-entitled case that the appeal heretofore and now being taken from the final Judgment and Decree of the District Court for the Territory of Alaska, Division Number One, at Juneau, Alaska, to the United States Court of Appeals for the Ninth Circuit by Appellants Robert S. Schy and Lois Lane and the appeal of William Richards, Clancy Henkins, and Joseph L. Riedi may be consolidated for the purpose of said appeal if said consolidation meets with the

No. 14856

United States
Court of Appeals
for the Ninth Circuit

WILLIAM RICHARDS, CLANCY HENKINS, JOSEPH L. RIEDI, ROBERT S. SCHY and LOIS LANE,

Appellants,

vs.

JUNEAU INDEPENDENT SCHOOL DISTRICT and DOUGLAS INDEPENDENT SCHOOL DISTRICT, to Be Known as JUNEAU-DOUGLAS INDEPENDENT SCHOOL DISTRICT,

Appellees.

Supplemental
Transcript of Record

Appeals from the District Court for the District of Alaska Division Number One.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.--1-6-56

No. 14856

United States
Court of Appeals
for the Ninth Circuit

WILLIAM RICHARDS, CLANCY HENKINS, JOSEPH L. RIEDI, ROBERT S. SCHY and LOIS LANE,

Appellants,

vs.

JUNEAU INDEPENDENT SCHOOL DISTRICT and DOUGLAS INDEPENDENT SCHOOL DISTRICT, to Be Known as JUNEAU-DOUGLAS INDEPENDENT SCHOOL DISTRICT,

Appellees.

Supplemental
Transcript of Record

Appeals from the District Court
for the District of Alaska
Division Number One.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-6-56

United States Court of Appeals
for the Ninth Circuit

No. 14856

WILLIAM RICHARDS, et al.,

Appellants,

vs.

JUNEAU INDEPENDENT SCHOOL DISTRICT, et al.,

Appellees.

STIPULATION

It Is Hereby Stipulated by and between M. E. Monagle, of attorneys for appellants, and R. Boochever, of attorneys for appellees, that there should be added to the transcript of record printed in the above-entitled case the attached Resolution No. 201 passed by the Common Council of the City of Douglas, Alaska, on January 10, 1955, for the reason that said resolution was submitted to the District Court and regarded as a part of the record in the proceedings in the District Court.

Dated at Juneau, Alaska, this 20th day of December, 1955.

/s/ M. E. MONAGLE,
Of Attorneys for Appellants.

/s/ R. BOOCHEVER,
Of Attorneys for Appellees.

RESOLUTION No. 201

Be It Resolved by the Common Council of the City of Douglas, Alaska:

In the event that the Juneau Independent School District and the Douglas Independent School District are consolidated as one district pursuant to the provisions of Chapter 93, Session Laws of Alaska, 1953, the Common Council of the City of Douglas, Alaska, shall, as soon as possible after such consolidation has been adjudged, amend Section 11 of its Sales and Services Tax Ordinance, that is, Section 11 of Ordinance No. 34, passed and approved April 4, 1952, as amended by Ordinance No. 42, passed and approved May 10, 1954, so as to read as follows:

"Section 11. The proceeds of the tax prescribed by and collected under this ordinance shall be distributed as follows:

"(a) One-half of such proceeds shall be deposited into the general revenue fund of the municipality;

"(b) One-half of such proceeds shall be deposited into a special fund of the municipality, which is hereby created, to be called the 'Douglas School Fund,' and shall be used for the exclusive special purpose of paying installments of principal and interest on indebtedness to be incurred for the purpose of securing and preparing a site for a high school building for the consolidated Juneau-Douglas Independent School District; constructing and equipping a

new high school for such District; and renovating, repairing and equipping the existing Fifth Street Grade School and High School buildings in Juneau, Alaska; which projects, other than the acquisition and preparation of a site, are to be constructed by the Alaska Public Works Administration under the Alaska Public Works program and sold to such District."

Passed by the Common Council and approved by the Mayor of the City of Douglas, Alaska, this 10th day of January, 1955.

Attest:

/s/ WILLIAM E. BOEHL,
Mayor.

[Seal] /s/ JANET SEY,
City Clerk.

[Endorsed]: Filed December 30, 1955.

No. 14,856

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM RICHARDS, CLANCY HENKINS, JOSEPH L. RIEDI, ROBERT S. SCHY and LOIS LANE,

Appellants,

vs.

JUNEAU INDEPENDENT SCHOOL DISTRICT and DOUGLAS INDEPENDENT SCHOOL DISTRICT, to be known as JUNEAU-DOUGLAS INDEPENDENT SCHOOL DISTRICT,

Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLANTS.

M. E. MONAGLE,
ROBERTSON, MONAGLE & EASTAUGH,
200 Seward Building, Juneau, Alaska,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,856

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM RICHARDS, CLANCY HENKINS, JOSEPH L. RIEDI, ROBERT S. SCHY and LOIS LANE,

Appellants,

vs.

JUNEAU INDEPENDENT SCHOOL DISTRICT and DOUGLAS INDEPENDENT SCHOOL DISTRICT, to be known as JUNEAU-DOUGLAS INDEPENDENT SCHOOL DISTRICT,

Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLANTS.

JURISDICTION.

This is an appeal from a Judgment of the District Court made and entered on March 18, 1955, establishing Juneau-Douglas Independent School District under the provisions of Chapter 93, SLA 1953 (P.R. 31-35). On March 28, 1955, appellants Robert S. Schy

and Lois Lane filed a Petition in the District Court on their own behalf and on behalf of the 290 petitioners similarly situated who signed the petition attached to their Petition and Motion, for leave to appear by Motion and for an order to alter and amend the Judgment and Order of the District Court and for a new trial and hearing (P.R. 36-42). On March 28, 1955, appellants William Richards, Clancy Henkins, and Joseph L. Riedi filed a petition, on their own behalf and on behalf of the 222 petitioners similarly situated who signed the petition previously filed in the District Court with the letter of John H. Dimond, attorney for the City of Douglas, Alaska (P.R. 26-28), in the District Court for leave to appear by Motion and for an order to alter and amend the Judgment and Order of the District Court and for a new trial and hearing (P.R. 42-48). The Petition and Motion of each set of appellants were argued together on April 22, 1955. The District Court made and entered its order denying both Petitions (P.R. 49) on May 21, 1955. An appeal was taken by each set of appellants from the District Court's final order and Judgment of April 22, 1955, by filing with the District Court a Notice of Appeal (P.R. 50-51).

The jurisdiction of the District Court is granted by 48 U.S.C.A. 101.

The jurisdiction of this Honorable Court is granted by Title 28 U.S.C.A. Judiciary and Judicial Procedure, Section 1291.

The Procedure of the Appeal is governed by 48 U.S.C.A. 103a, extending the Federal Rules of Civil

Procedure on July 18, 1949, to the District Courts of Alaska.

The appeal of appellants Robert S. Schy and Lois Lane was consolidated with the appeal of appellants William Richards, Clancy Henkins and Joseph L. Riedi by the order of this Honorable Court made and entered herein on August 17, 1955 (P.R. 70-71).

STATEMENT OF CASE.

The Juneau Independent School District was organized under the provisions of Section 37-3-41 ACLA 1949 and embraces approximately 202 square miles and includes the municipal corporation of Juneau, Alaska, within its boundaries (P.R. 3-4). The Douglas Independent School District was organized under the provisions of Section 37-3-41 ACLA 1949 and embraces approximately 95.2 square miles and includes the municipal corporation of Douglas, Alaska, within its boundaries (P.R. 4-5).

On March 28, 1953, the Legislature of the Territory of Alaska, enacted Chapter 93, SLA 1953, into Law. The pertinent parts of Chapter 93, SLA 1953, read as follows:

> "Section 1. Whenever any two independent or incorporated school districts or any independent and incorporated school district, have any contiguous boundary they may be consolidated in the manner hereinafter provided, and when so consolidated shall become a single school district subject to all the laws and ordinances of the larger in population of the school districts so

consolidated based on the number of people who voted within such district at the last general election. The boundaries of any independent or incorporated school district shall be considered as contiguous for the purpose of this Act unless said boundaries are completely separated by land. Independent or incorporated school districts, the boundaries of which are separated only by a river, stream, slough, channel, inlet, bay or other narrow body of water, shall be considered as contiguous.

"Section 2. The area to be included in such consolidated independent or incorporated school districts shall not embrace more than 1,000 square miles of territory.

"Section 3. (a) Separate petitions from each of the independent or incorporated school districts desiring to be consolidated shall first be presented to the Judge of the United States District Court of the Judicial Division in which the independent or incorporated school districts are located. Each petition must be signed by as many voters as would equal 25% of the number of people who voted in the respective independent or incorporated school districts at the last general election and such petitions shall specify, as nearly as may be possible, the location, boundaries and areas of each of the independent or incorporated school districts to be consolidated, and shall specify the proposed name of the consolidated independent or incorporated school districts. Such petitions shall further certify the combined area of the independent or incorporated school districts desiring to be consolidated, and must certify that said area does not exceed the maximum number of square miles authorized by this Act.

"(b) The Judge of the District Court, upon presentation and filing of such petitions, shall order an election in each of said independent or incorporated school districts for the purpose of determining whether the people desire such consolidation and shall by said order fix the date for the election, the place and hours of voting, and appoint three qualified voters in the proposed consolidated school district to supervise and appoint election officers for such election. A printed or typewritten copy of said order shall be posted in at least three public places within the limits of each of the independent or incorporated school districts requesting consolidation for at least thirty (30) days prior to the day of election, and such posting shall be sufficient notice of such election.

"Section 4. The qualified electors of the communities proposed to be consolidated shall also, at said election by a separate ballot, choose a board of five (5) directors for the consolidated school district who must be qualified electors of the consolidated school district and whose term of office shall be as hereinafter provided.

"Section 5. The judges of election shall also canvass the votes given at said election for members of the Board of Directors, and shall declare the five candidates who have received the largest number of votes for such office duly elected and shall issue and deliver to them certificates of their election, provided that the majority of votes cast in each of such districts have voted for consolidation.

"Section 6. The qualifications of electors at said election shall be the same as are required by Sec. 37-3-44 ACLA 1949.

"Section 7. The oath of election judges, the canvassing and compiling of the votes cast and the certification of the results of said election in each of said independent or incorporated school districts, shall be the same as is required by Sec. 37-3-45 ACLA 1949.

"Section 8. If a majority of the votes cast at said election in each of the independent or incorporated school districts desiring consolidation are in favor of consolidation, the District Judge shall, by order in writing entered in the record of the proceedings, adjudge and declare that said independent or incorporated school districts are consolidated and that the enlarged area (describing its boundaries) shall thenceforth constitute one school district, and specify its name. Thereafter the consolidated district shall function as to all its parts as a school district in conformity with applicable laws of Alaska and pursuant to its own ordinances, providing that the ordinances of the larger of the independent or incorporated school districts, according to the number of registered voters in the last general election held therein, so consolidated shall be in effect upon the order consolidating the districts. All assets of each of the independent or incorporated school districts shall become the property of the consolidated district, and all liabilities of each of such independent or incorporated school districts shall become the liabilities of the consolidated district.

"Section 13. Except as otherwise provided herein, the statutes applying to Independent School Districts shall apply to Consolidated School Districts established hereunder."

That on January 21, 1955, appellee filed a petition in the District Court praying that an order of election be held and conducted in the manner specified and in accordance with Ch. 93, SLA 1953, and that the Juneau Independent School District and the Douglas Independent School District be consolidated to constitute one School District to be known as Juneau-Douglas Independent School District in accordance with the provisions of Ch. 93, SLA 1953 (P.R. 3-13).

That thereafter and on January 21, 1955, the District Court made and entered its order directing that an election be held in each of said two separate school districts to determine whether the people desired such consolidation of the two school districts and provided the time, place and method for said elections and appointed election judges (P.R. 14-17).

That thereafter and on February 3, 1955, the election judges appointed by the District Court passed a resolution to the effect that an election be held in the two separate school districts on the following proposal, namely:

"Proposal"

> "Shall the Juneau Independent School District and the Douglas Independent School District be consolidated under the name of Juneau-Douglas Independent School District, in which event the ordinances of the Juneau Independent School District, being the larger of said school districts according to the number of registered voters at the last general election held therein, shall be in effect in such consolidated school district, including the ordinance providing for a 1% tax on re-

tail sales and services, which tax shall automatically become effective in that portion of the Douglas Independent School District located beyond the corporate limits of the City of Douglas, Alaska, upon entry of an order by the District Court consolidating said school districts. In the event of the approval of this proposal by a majority of the voters of each of said school districts, the order consolidating said school districts shall be contingent on the Common Council of the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax.

"Each ballot shall set forth the above proposition preceded by the instructions:

'Vote for or against the following proposal by placing an "X" in the appropriate box,' and followed by the words:

For Consolidation ☐
Against Consolidation ☐"

and that an election also be held on a separate form of ballot for the election of the members of the Board of Directors of the Consolidated School District and provided the qualifications of voters, for registration, and established the voting precincts (P.R. 18-21).

The Judges of Election took their oath on January 31, 1955 (P.R. 22), and on March 10, 1955, filed their certificate of election (P.R. 23-25).

The Record reveals that John H. Dimond, attorney for the City of Douglas, Alaska, wrote a letter to District Judge George W. Folta on behalf of the City

Council on March 15, 1955, advising him that 222 residents and taxpayers of the City have petitioned the City Council not to amend its tax ordinance (P.R. 26-27).

On March 18, 1955, the District Court entered its order consolidating the Juneau Independent School District and Douglas Independent School District to be known as Juneau-Douglas Independent School District (P.R. 31-35), but the City of Douglas, Alaska, was not a party to any of the proceedings in this case and said order consolidating said two school districts was not made contingent upon the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenue would be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax, nor did said order require the Common Council of the City of Douglas to so amend its said ordinance (P.R. 31-35).

Following this and on March 28, 1955, two appellants as permanent residents and inhabitants, qualified electors and taxpayers within the boundaries of Douglas Independent School District, either within or without the municipality of Douglas, Alaska, filed their petition for leave to appear by Motion and Order and for a new trial and hearing (P.R. 36-42). A petition signed by 290 residents and taxpayers of the Douglas Independent School District was attached to one Petition (P.R. 42). That on the same day three appellants as permanent residents and inhabitants, qualified electors, property owners and taxpayers of

the Municipal Corporation of Douglas, Alaska, filed their petition for leave to appear on their own behalf and on behalf of all other permanent residents and inhabitants who are qualified electors, property owners and taxpayers within the municipality of Douglas, Alaska, who were parties to the petition previously filed in the District Court in this case with the letter of John H. Dimond, attorney for the City of Douglas, Alaska (P.R. 26-28). Both of these petitions were consolidated by the order of this Court dated August 17, 1955, for the purpose of trial (P.R. 70-71).

Appellants' petitions were that the Order, Judgment and Decree of Consolidation dated March 18, 1955 (P.R. 31-35), consolidating the two school districts be vacated and set aside, or altered or amended, or that a new trial be granted and movants authorized to appear and defend on their own behalf and on behalf of all other persons similarly situated for the following reasons:

1. That the Notice of Election and ballots used at the election contained a provision that "The order consolidating said school districts shall be contingent on the Common Council of the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District Sales and Services Tax" (P.R. 37; P.R. 43-44).

2. That the Common Council of the City of Douglas has not amended its 2% retail Sales and Service Tax ordinance as provided in the Notice of Election

and Official Ballot used at the election, but on the contrary voted on March 18, 1955, in opposition to amending its said sales tax ordinance (P.R. 38; P.R. 44).

3. That there are only six members of the Common Council of the Municipality of Douglas, Alaska, and if there is a tie in any vote the Mayor of the Municipality has the right to cast the deciding vote. That three members of the Common Council and the Mayor are movants herein and have refused to vote and will not vote to amend said 2% sales and service tax ordinance, and that the Douglas retail sales and service tax cannot be amended as required by the order of election and official ballot used at the election on the question of consolidation (P.R. 38; P.R. 45).

4. That it would be illegal for the Common Council of the City of Douglas to amend its 2% retail sales and service tax ordinance without a vote of the residents within the municipal corporation of Douglas, Alaska, because of the prohibitions contained in Chapter 38, Session Laws of Alaska 1949, reading as follows:

> "It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with the consent of the voters at another referendum."

and because of the prohibitions contained in Chapter 121, Session Laws of Alaska, 1953, containing the same exact words (P.R. 39; P.R. 45-46).

5. That there is no legal ordinance in effect in the Municipal Corporation of Juneau, Alaska, or in the Juneau Independent School District, legally providing for a 1% tax on sales and services. There is an ordinance that purports to levy a sales tax on retail sales and services, and also an ordinance that purports to amend the City of Juneau Sales Tax Ordinance No. 338 to include a sales tax on "Rents", but neither said Ordinance No. 338 nor Ordinance No. 369 of the City of Juneau, Alaska, are legal or of any binding effect on the residents of Juneau, Alaska, or Juneau Independent School District (P.R. 39-40; P.R. 46-47).

6. That a majority of the residents and inhabitants of the Municipal Corporation of Douglas, Alaska, voted against consolidation of the Juneau Independent School District and Douglas Independent School District, and a majority of the residents of Douglas, Alaska, are opposed to being required to contribute retail sales, service and rental taxes collected wholly within the limits of the municipality of Douglas, Alaska, towards the construction of school buildings or for any other purpose outside of the limits of the corporate boundaries of said municipality (P.R. 40; P.R. 46-47).

7. That many of the petitioners who signed the petition attached to the petition of appellants Robert S. Schy and Lois Lane voted "For Consolidation" because they were persuaded to do so by misstatements and misrepresentations made by various school officials (P.R. 40-41).

8. That Chapter 93, Session Laws of Alaska 1953, under which the election for consolidation was held and under which the District Court's order of consolidation of March 18, 1955, was entered (P.R. 31-35) attempts to deprive the residents of the Municipal Corporation of Douglas, Alaska, of the right to govern themselves by permitting residents outside of the municipal boundaries of the municipality to vote that the ordinances of Juneau Independent School District will govern within the boundaries of the Townsite and Municipality of Douglas, Alaska (P.R. 47).

9. That Chapter 93, Session Laws of Alaska 1953, is unconstitutional in that it attempts to deprive movants (appellants) and all other residents of Douglas, Alaska, and the Municipal Corporation of Douglas, Alaska, of their property without due process of law (P.R. 47).

10. That Chapter 93, Session Laws of Alaska 1953, is also unconstitutional in that the residents and inhabitants of Douglas, Alaska, will be governed by the ordinances of Juneau Independent School District, and the inhabitants of Douglas, Alaska, would be deprived of the exclusive right to govern themselves (P.R. 47-48).

Thereafter the two petitions of appellants came on for argument on April 22, 1955, and thereafter and on April 23, 1955, the District Court entered a minute order denying the two petitions of appellants (P.R. 49).

APPEAL.

The Court's Judgment and Order Establishing Juneau-Douglas Independent School District (P.R. 31-35) was signed by the District Judge on March 18, 1955, and filed on March 22, 1955 (P.R. 35).

The Court's Order denying the Petition and Motion of appellants for a new trial was entered April 23, 1955 (Minute Order P.R. 49).

Notices of Appeal dated May 20, 1955, were filed by all appellants on May 21, 1955 (P.R. 50-51).

Cost Bonds were made by all appellants and filed on May 21, 1955 (P.R. 52-57).

Order extending time until August 15, 1955, within which to docket record on appeal was entered June 21, 1955 (P.R. 59-60).

QUESTIONS INVOLVED.

1. Whether an election can be held except pursuant to a statute or constitution, and if an election is held pursuant to a statute whether said statute must be followed.

2. Whether there is any statutory authority contained in Chapter 93, SLA 1953, authorizing an election on a proposition as to whether or not voters are or are not in favor of a consolidation of the two School Districts contingent upon the municipal corporation of Douglas, Alaska, amending its tax ordinance as contained in the proposal and on the ballot in the case at bar (P.R. 17-23-24).

3. Whether or not the ballots at an election authorized by statute must conform to the statute and the order of the District Court authorizing the election.

4. Whether or not the District Court was in error in making an order of consolidation of the two School Districts when the ballot at the election did not comply with any statutory law or with the order of the Court authorizing said election.

SPECIFICATIONS OF ERROR.

1. Under the laws of the Territory of Alaska authorizing the consolidating of two or more independent or incorporated school districts (Chapter 93, Session Laws of Alaska 1953) a printed or typewritten copy of the Order of the Judge of the District Court must be posted in at least three public places for at least thirty days prior to the day of election as required by said law, and the Trial Court erred in not requiring that the proposal set forth on the election ballot used in said school district election conform to the printed or typewritten copy of the Court's order for the election and the provisions of Chapter 93, Session Laws of Alaska 1953 (P.R. 65).

2. The Trial Court erred in making and entering its Order of March 18, 1955, based upon ballots that did not conform to the Laws of the Territory of Alaska and the District Court Order of election entered herein on January 21, 1955 (P.R. 66).

3. That the combined proposal and ballot used at the election of March 8, 1955, was contrary to law and to the Order of the District Court dated January 21, 1955, ordering the election on the proposed consolidated school district, and there was no law in the Territory of Alaska authorizing such combined proposal and ballot or such a ballot as was used at the election of March 8, 1955 (P.R. 66).

4. The Trial Court erred in making and entering its Order of March 18, 1955, establishing Juneau-Douglas Independent School District contrary to any provision of law in existence in the Territory of Alaska, and particularly contrary to the expressed provisions of Chapter 93, Session Laws of Alaska 1953, in view of the fact that the ballot was not for consolidation or against consolidation of the two school districts but was a ballot contingent upon the common council of the City of Douglas, Alaska, amending its 2% sales and service tax ordinance (P.R. 66).

5. The Trial Court erred in refusing to grant the petition of Appellants William Richards, Clancy Henkins, and Joseph L. Riedi and in refusing to alter and amend the Order of Consolidation—establishing Juneau-Douglas Independent School District—and in refusing to grant them a new trial and hearing (P.R. 66).

6. The Court erred in not granting William Richards, Clancy Henkins, and Joseph L. Riedi and other inhabitants, qualified electors and taxpayers, a fair

and impartial trial or hearing and in not according them due process of law or a fair opportunity to present their evidence in opposition to the consolidation of Juneau Independent School District and Douglas Independent School District to be known as Juneau-Douglas Independent School District (P.R. 67).

7. The Trial Court erred in refusing to alter and amend its Judgment and Order entered herein on March 18, 1955, establishing the Juneau-Douglas Independent School District (P.R. 67).

8. The Trial Court erred in entering its Minute Order of April 23, 1955, denying Appellants' Petition for leave to appear and for an Order to alter and amend the Judgment and Order of said Court entered on March 18, 1955, and denying the Petition of Appellants for a new trial and hearing (P.R. 67).

ARGUMENT.

In 1953 Chapter 93, SLA 1953, became the law of the Territory of Alaska and provided that two independent school districts could be consolidated under certain conditions and if certain steps were taken and after an election was held to determine whether or not a majority of the residents of both school districts to be consolidated were "For Consolidation". The law provided that the ballot to be submitted must give the electorate a right to vote "For Consolidation" or "Against Consolidation". There is no provision in the law for any other type of ballot.

In the order of the District Court calling for an election (P.R. 14) it was provided that an election be held . . . "for the purpose of determining whether the people desire such consolidation". However, such proposal or question was not submitted to the people in the two school districts. The proposal submitted to the people as shown by the resolution of the election judges (P.R. 17-18-19) and the certificate of election (P.R. 23-24) was:

> "Shall the Juneau Independent School District and the Douglas Independent School District be consolidated under the name of Juneau-Douglas Independent School District, in which event the ordinances of the Juneau Independent School District, being the larger of said school districts according to the number of registered voters at the last general election held therein, shall be in effect in such consolidated school district, including the ordinances providing for a 1% tax on retail sales and services, which tax shall automatically become effective in that portion of the Douglas Independent School District located beyond the corporate limits of the City of Douglas, Alaska, upon entry of an order by the District Court consolidating said school districts. In the event of the approval of this proposal by a majority of the voters of each of said school districts, the order consolidating said school districts shall be contingent on the Common Council of the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax.

"Each ballot shall set forth the above proposition preceded by the instructions:

"Vote for or against the following proposal by placing an 'X' in the appropriate box" and followed by the words:

For Consolidation ☐
Against Consolidation ☐."

The question as to whether or not the people in the two school districts were "For Consolidation" or "Against Consolidation" was not submitted to the people as required by Chapter 93, SLA 1953, or by the District Court's order for election (P.R. 14). The question upon which the people did express an opinion or desire, assuming for a moment that the results of the election can be said to show anything at all, is thus expressed upon the ballot.

"In the event of a majority vote by voters of each of said two school districts 'For Consolidation' of said two school districts, said consolidation shall be contingent on the common council of the City of Douglas amending its 2% retail sales and services tax ordinance so that one-half of the revenue thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and service tax."

There is absolutely no legal authorization for framing the ballot around a contingency. The only proposal authorized to be submitted by Chapter 93, SLA 1953, is the question as to whether the voters want or do not want the two school districts consolidated. The ballot obviously did not submit such question at all.

NO ELECTION IS VALID UNLESS EXPRESSLY AUTHORIZED BY STATUTE.

Our system of elections was unknown to the common law. The entire subject is governed by statutory law.

Taylor v. Beckham, 178 U.S. 548, 577.

No valid election can be held except pursuant to a statute or constitution. There is no reserved power in the people to hold an election, and there is no such inherent power vested in the Courts.

School District No. 1 v. Gleason, 168 P. (Ore.) 347;

State v. Kozer, 239 P. (Ore.) 805;

Thompson v. James, 250 N.W. (Neb.) 237.

And the Courts cannot exercise the legislative function.

Territory v. Stewart, 23 P. (Wash.) 405.

TWO SEPARATE PROPOSITIONS CANNOT BE COMBINED INTO ONE AND SUBMITTED TO THE VOTER AS A SINGLE PROPOSITION.

Since there can be no valid election but in pursuance of statutory authority, it follows that where a statute does authorize an election said statute must be strictly followed. Where the statute authorizes an election on one and only one proposition, such as is involved in this case, the election is invalid if another proposition be submitted to the voters, for then it would be the same as if there were no statutory authority at all. See: *Thompson v. James,* 250 N.W. (Neb.)

237; *McElroy v. State,* 47 S.W. (Tex. Crim. App.) 359; *Hallum v. Coleman,* 85 S.W. 2d (Tex. Civ. App.) 989; *Smith v. Morton Independent School District,* 85 S.W. 2d (Tex. Civ. App.) 853.

The ballots involved in the case at bar submitted to the voters two questions (1) whether the Juneau and Douglas Independent School Districts should be consolidated, and (2) whether the consolidation should be contingent upon the common council of the City of Douglas, Alaska, amending its sales and service tax. The questions were submitted in one single proposition. The voter could not say whether he desired the consolidation, or if he was against consolidation, or if he was for consolidation only if the Douglas sales tax ordinance was amended, or if he was against consolidation whether Douglas amended its sales tax ordinance or not, or whether he was for consolidation whether Douglas amended its sales tax ordinance or not. The ballot and election was unfair to the voters, and it was contrary to the laws of Alaska to so put the proposition on the ballot. This is because the voter, in order to get what he earnestly wants or thinks best for his community is compelled to vote for things he does not want. See: *State v. Maitland,* 246 S.W. (Mo.) 267; 29 *C.J.S.* 246, Section 170; 4 *A.L.R.* 623.

A BALLOT MUST GIVE THE VOTER AN OPPORTUNITY TO EXPRESS HIMSELF CLEARLY FOR OR AGAINST A PROPOSITION SUBMITTED, OR THE ELECTION IS VOID.

In the election in the case at bar the voters were not permitted to vote yes or no on the proposition as to whether they were "For Consolidation" or "Against Consolidation" of the two school districts, because the proposition was framed upon the contingency of the amendment of the City of Douglas sales and service tax ordinance. Moreover, the voter could not vote that he was "Against Consolidation" for such a vote could mean either that he was against the consolidation measure, or, that he was against consolidation being contingent upon the City of Douglas amending its sales and services tax ordinance. See: 29 *C.J.S.* 251, Section 173; *People ex rel. Duncan v. Worley,* 103 N.E. (Ill.) 579.

There was no substantial compliance or attempted compliance with the election procedure prescribed by Chapter 93, SLA 1953, as far as the notice of election or the ballot used at the election are concerned and therefore the election should be invalidated and the order of consolidation of the Juneau Independent School District and Douglas Independent School District set aside.

29 *C.J.S.* 246, Section 170;
78 *C.J.S.* 782, Section 57;
29 *C.J.S.* 251, Section 173;
State v. Maitland, 246 S.W. (Mo.) 267;
People ex rel. Duncan v. Worley, 103 N.E. (Ill.) 579.

In 1949 Chapter 38, Session Laws of Alaska 1949, became law in the Territory of Alaska and was the first law of the Territory authorizing a municipality to levy and collect a consumer's sales and services tax in the Territory. The pertinent part of said law reads as follows:

> "(b) CONSUMER'S SALES TAX. To levy and collect a consumer's sales tax not exceeding two percentum of the sales price on all retail sales and services made within the municipality; provided, that the consent of the qualified voters of the municipality is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot. If fifty-five percent (55%) or more of the votes cast in said referendum are in the affirmative, the council may thereafter enact such a tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the municipality. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and that although such method of taxation be established within a city, the council may at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose

unless with consent of the voters at another referendum."

Thereafter and in 1951 Chapter 47, Session Laws of Alaska, 1951, became law in the Territory of Alaska and subsection (b) of Chapter 38, Session Laws of Alaska 1949, was thereby repealed.

Thereafter and in 1953 Chapter 121, Session Laws of Alaska 1953, became law in the Territory of Alaska authorizing a municipality to levy and collect a consumer's sales, rents and services tax in the Territory. The pertinent part of said law reads as follows:

"(b) CONSUMER'S SALES TAX. To levy and collect a consumer's sales tax not exceeding two percentum of the sales price on all retail sales, rents and services, made within the municipality; provided, that the consent of the qualified voters of the municipality is first obtained through a referendum vote at a general or special election, upon ballots which clearly present the proposition as to whether such sales tax shall be authorized within the municipality. The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot. If a majority of the votes cast in said referendum are in the affirmative, the council may thereafter enact such a tax in the nature of a levy upon buyers but with imposition upon sellers of the obligation of collecting same at the time of sale or at time of collection with respect to credit transactions, and transmit same to the municipality. No such sales tax proposition shall be

presented to the voters more than once in any twelve months. The sole purpose of this subsection is to enable cities, with the consent of the residents thereof, to impose sales taxes, and that although such method of taxation be established within a city, the council may, at any time abandon same. It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum.

"Section 2. All sales taxes heretofore levied and collected by municipalities within the Territory of Alaska, pursuant to ordinances which were valid at the time of their enactment, are hereby ratified and confirmed.

"Section 3. An emergency is hereby declared to exist, and this Act shall be in full force and effect immediately upon its passage and approval."

This Honorable Court will observe that there was no law in effect in the Territory of Alaska on April 4, 1952, when the common council of the City of Douglas, Alaska, enacted its Sales and Services Tax Ordinance No. 34 (see: Stipulation and Resolution No. 201 added to the transcript of record printed herein). Since there was no law in effect in Alaska on April 4, 1952, granting the municipal corporation of Douglas, Alaska, authority to enact a sales and services tax said ordinance was and is null and void.

Valentine v. Robertson et al., Circuit Court of Appeals, Ninth Circuit, 300 F. 521, 5 Alaska Federal 230.

And, therefore, the notice of election herein and the ballot used at said election (P.R. 18) and the certificate of election (P.R. 23) provided that the two school districts would be consolidated "on the contingency that the common council of the City of Douglas amend its retail sales and services tax ordinance" that in fact was void and was not a valid ordinance of said City. And the District Court was in error in entering its order of March 18, 1955, consolidating said two school districts (P.R. 31).

Moreover, Chapter 38, Session Laws of Alaska 1949 which was repealed by Chapter 47, Session Laws of Alaska 1951, provided:

> "It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum."

And, when Chapter 121, Session Laws of Alaska 1953, was enacted and again authorized a municipality to levy and collect a sales, rents and services tax it also contained this same provision, namely:

> "It is also the intent that if consent to such tax be obtained for a special purpose, the proceeds of the tax may not be used for any other purpose unless with consent of the voters at another referendum."

We submit that this clearly shows the intent of the legislature and that the common council of the City of Douglas, Alaska, could not legally amend its illegal sales tax ordinance (at least not without consent of

the voters within the municipality) at another referendum. And, no consent of the voters at another referendum has ever been obtained.

For the reasons above given Resolution No. 201 (attached to the Printed Record) resolving to amend an invalid ordinance at some future date should not have been considered by the Trial Court for any purpose whatever.

There is nothing in the record to indicate whether the District Court considered Resolution No. 201 or not, but it is a fundamental principle of law that a municipal council can rescind its promises and resolutions, the same as any other legislative body and petitioners should have been granted a new trial by the District Court in order to adduce existing evidence in proof of the fact that the municipal council of Douglas, Alaska, had not only rescinded its Resolution No. 201 adopted January 10, 1955, at a regular meeting on March 15, 1955, but in fact voted by a majority vote not to amend its sales tax ordinance.

Even though the certificate of election (P.R. 23-24) shows that a majority of the voters voted "Yes" on the official ballot at the consolidation election the District Court erred in entering its Order and Judgment of Consolidation establishing Juneau-Douglas Independent School District (P.R. 31-35) since all votes on all ballots were cast on a contingent basis. They voted on the proposal as stated in the resolution (P.R. 17-19) that "In the event of the approval of this proposal by a majority of the voters of each of said school districts, the order consolidating said school

districts shall be contingent on the common council of the City of Douglas amending its 2% retail sales and services tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax." The common council of the City of Douglas has never at any time amended its sales and service tax ordinance in any respect and the contingency set forth in the ballot submitted to the voters in the Juneau and the Douglas Independent School Districts has never been met and said order of consolidation should not have been made and entered until said contingency was met and said Douglas sales and service tax ordinance amended as required by the ballot.

For the reasons stated it is respectfully submitted that the Order of the District Court of March 18, 1955, establishing Juneau-Douglas Independent School District (P.R. 31-35) be vacated and set aside.

Dated, Juneau, Alaska,
January 6, 1956.

M. E. MONAGLE,
ROBERTSON, MONAGLE & EASTAUGH,
Attorneys for Appellants.

No. 14,856

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM RICHARDS, CLANCY HENKINS, JOSEPH L. RIEDI, ROBERT S. SCHY and LOIS LANE,

Appellants,

vs.

JUNEAU INDEPENDENT SCHOOL DISTRICT and DOUGLAS INDEPENDENT SCHOOL DISTRICT, to be known as Juneau-Douglas Independent School District,

Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

FACTS.

Counsel for appellants has made a detailed statement of the facts involved in this case in his statement of the case appearing on pages 3 to 13 of appellants' brief. It would therefore be superfluous to repeat the detailed information contained in appellants' statement.

This case arises from an order of the District Court consolidating the Juneau Independent School District and the Douglas Independent School District. The order was entered after an election duly held in both of said districts. This election resulted in a vote in the Juneau Independent School District of 702 votes for consolidation and 239 votes against consolidation; and a vote in the Douglas Independent School District of 274 votes for consolidation and 209 votes against consolidation. See Tr. 24. Thereafter, the Honorable George W. Folta, Judge of the District Court for the District of Alaska, Division Number One at Juneau, entered an order consolidating said school districts, which order was signed on March 18, 1955.

Appellants, who are residents of the City of Douglas and of the portion of the Douglas Independent School District lying outside the corporate boundaries of the City of Douglas, Alaska, filed petitions for leave to appear by motion and for an order revoking the consolidation of the school districts.

The reasons set forth for revoking the consolidation of the districts which have been relied upon on this appeal according to appellants' brief may be summarized as follows:

Appellants contend that the form of ballot was not in accordance with the statutory requirements contained in Chapter 93, SLA 1953; that the form of ballot contained two proposals and thus was defective; that the ballot was contingent upon the City of Douglas amending its sales tax ordinance, and that the City of Douglas could not legally so amend its sales

tax ordinance. The petitions filed by appellants in the District Court did not include most of these grounds now presented upon appeal. The learned trial court, after hearing arguments by the appellants and appellee, denied appellants' petitions to set aside the order consolidating the school districts. This appeal has been taken from that order denying appellants' petitions.

I.

APPELLANTS HAVE NO RIGHT, IN THE MANNER HEREBY ATTEMPTED, TO CONTEST THE ELECTION WHEREBY THE SCHOOL DISTRICTS WERE CONSOLIDATED.

Appellants filed petitions after an order had been entered by the District Court for the District of Alaska consolidating the Juneau and Douglas Independent School Districts. By their petitions appellants sought to have the order consolidating the school districts set aside, based primarily upon allegations pertaining to supposed irregularities or illegalities in the form of ballot. In effect, appellants plead that legal fraud was perpetrated upon the voters who, by a substantial majority in both of the school districts, indicated their desire to have the districts consolidated.

> "The right to contest an election is not a common law right. Elections belong to the political branch of the government and are beyond the control of the judicial power. In the absence of any statutory proceeding the only remedy in the nature of an election contest known to the common law

is quo warranto, or in modern practice an information in the nature of quo warranto."

29 *C.J.S.*, Sec. 246, page 355.

Alaska has abolished the writ of quo warranto and proceedings by information in the nature of quo warranto, specifying that the proceedings previously obtainable under those forms may be obtained by a statutory action set forth in Section 56-4-2, ACLA 1949. See Section 56-4-1, ACLA 1949.

Section 56-4-2 specifies as follows:

"*Action against public or private corporation on ground of fraud or concealment: Direction by Governor.* An action may be maintained in the name of the United States, whenever the governor shall so direct, against a corporation either public or private, for the purpose of avoiding the act of incorporation, or the act renewing or modifying its corporate existence, on the ground that such act or either of them was procured upon some fraudulent suggestion or concealment of a material fact by the persons incorporated, or some of them, or with their knowledge and consent; or for annulling the existence of such corporation, when the same has been formed under any general law operating in this Territory therefor, on the ground that such incorporation, or any renewal or modification thereof, was procured in like manner."

This section clearly sets forth the remedy available to citizens who feel that a modification of corporations has been procured by fraudulent suggestion or concealment of a material fact such as by setting forth

propositions in a ballot in a misleading form as contended by appellants.

> "Under statutes providing for election contest, the right, as well as the procedure to be followed, is purely statutory, and strict compliance with the statute is necessary."
>
> 29 *C.J.S.,* Sec. 247, page 355.

It is to be noted that the action provided for in the Alaska act must be maintained in the name of the United States under direction of the Governor or the Territory of Alaska. This is the only procedure by which an election such as that which resulted in the consolidation of the Douglas and Juneau Independent School Districts may be contested.

Thus in the case of *Rister v. Plowman,* Court of Civil App., Tex., 98 S.W. 2d 264, an election was held for consolidation of school districts. Upon such consolidation being declared, the trustees of one of the districts sued the trustees of the other district and the County School Board, contesting the election. A statute required that either the county attorney or the officer who declares the official result of an election be made a party in any contest of an election. The court held that naming such parties in compliance with the statute was a prerequisite to the jurisdiction of the court to determine an election contest.

Similarly, in the case of *Village of Metamora v. Village of Eureka, et al.,* (Supreme Court of Ill.), 45 N.E. 209, an election was held to change the county seat from Metamora to Eureka. The Illinois statute for contesting an election required that the county be

made a party defendant. The court held that failure to make the county a defendant required dismissal of the contest.

In the case of *State ex rel. Daugherty v. County Court of Lincoln,* 127 W. Va. 35, 31 S.E. 2d 321, 323, the unsuccessful candidate in an election for a judgeship made a motion to the County Court to hear a contest of the votes cast. Daugherty, the successful candidate, objected on the grounds that the court had no jurisdiction. The County Court overruled this objection and Daugherty applied to the Supreme Court for a writ of prohibition. The Supreme Court held:

> "An election contest is purely a constitutional or statutory proceeding. The common law knew no such method of testing the validity of a nomination or election. 29 C.J.S., Elections, Sec. 246. Our constitution confers on County Courts jurisdiction to hear and determine contests in strictly limited cases . . .
>
> "The County Court, having no inherent or common law authority to conduct a contest for any kind of office, and having no such authority conferred upon it by the constitution or by statute to hear such contest . . . is, of course, barren of such power."

As stated in 18 *Am. Jur.,* Sec. 284, jurisdiction to hear and determine election contests is dependent upon and regulated by statutory provision. See *Cahill v. McDowell,* 40 N.D. 625, 169 N.W. 499; *State ex rel. Fawcett v. Superior Court,* 14 Wash. 604, 45 P. 23; *Cundiff v. Jeter,* 172 Va. 470, 2 S.E. 2d 436; *Johnson v. Stevenson,* 170 F. 2d 108 (C.C.A. 5), cert. den. 336

U.S. 904, 93 L.Ed. 1069; *Sigsbee v. Birmingham,* 157 Ala. 418, 47 So. 1036. The appellants in the subject case have not followed the Alaska statutory procedure to contest an election and, accordingly, it is respectfully submitted that their appeal from the order of the District Court denying their petition should be dismissed.

II.

THE ELECTION WHEREBY THE JUNEAU AND DOUGLAS INDEPENDENT SCHOOL DISTRICTS WERE CONSOLIDATED WAS EXPRESSLY AUTHORIZED BY STATUTE.

Learned counsel for appellants contends that the election held for the purpose of determining whether the voters in the Juneau and Douglas Independent School Districts desired consolidation was not authorized by statute. Chap. 93, SLA 1953, expressly provides for an election in order to determine whether two independent school districts shall be consolidated.

Counsel incorrectly states that this statute "provided that the ballot to be submitted must give the electorate a right to vote 'For Consolidation' or 'Against Consolidation'." There is no such provision in the act which merely states that the judge of the District Court shall order an election in each of said independent school districts "for the purpose of determining whether the people desire such consolidation . . ." See Section 3(b), Chap. 93, SLA 1953. No exact form of ballot is prescribed by Chap. 93, SLA 1953, and the form of ballot actually used in the elec-

tion clearly indicated the desire of a substantial majority in each independent school district as well as a substantial majority of all the voters to have the districts consolidated.

It is true that there is information contained in the proposal which clarified the tax situation which would result upon the consolidation being effected. The voters, however, were asked to vote on one proposition and one proposition only, namely, whether they were "For Consolidation" or "Against Consolidation".

There can be no question but that the election was held under express statutory authority. The question as to whether the form of ballot as used in the election was a proper form of ballot will be discussed at length in the next sections of this brief. It appears that counsel's objection actually goes to the form of ballot rather than to the statutory authority for the election.

III.

THE QUESTION OF THE FORM OF BALLOT USED IN THE ELECTION IS NOT PROPERLY BEFORE THIS COURT.

Counsel contends in his brief that the form of ballot used in the election combined two propositions into one and failed to give the voter an opportunity to express himself clearly for or against the proposition submitted. At the outset it is to be noted that no mention was made of any such defect in the statement of points upon which this appeal was taken, although the speci-

fications alleged that the ballots did not conform to the laws of the Territory of Alaska. (See Tr. 61 and 65.)

Moreover, these contentions pertaining to alleged defects in the form of ballot were nowhere set forth in appellants' "Petition for Leave to Appear by Motion and For an Order to Alter and Amend the Judgment and Order Herein and For New Trial and Hearing," the only pleading presented to the court below. Having failed to present these issues to the District Court, and having failed to set them forth in their statement of points, appellants are precluded from raising the issues at this time. See *Western National Ins. Co. v. LeClare,* 163 F. 2d 337, wherein this honorable court stated:

> "Three points argued by appellant were that the evidence is neither clear nor convincing; that it does not show Raymond's authority to enter into an oral contract for or on behalf of appellant; and that it does not show Mr. LeClare's authority to act for or on behalf of appellee. These points were not stated in appellant's statement of points and hence need not be considered by us."

In the case of *Northwestern Steamship Co. v. Cochran,* 191 F. 146, involving an appeal from the United States District Court for the District of Alaska to this honorable court, it was stated:

> "The defense that the plaintiff was not the real party in interest was not made in the pleadings, nor was it suggested in the court below. The objection 'that plaintiff is not the real party in interest, and hence has no right to sue, comes too late when made for the first time in the appellate court.' "

To the same effect it was stated in *DeJohn et al. v. Alaska Matanuska Coal Co. et al., Agostino v. Same,* 41 F. 2d 612:

> "There is some contention here by Agostino that he is entitled to the funds, or a part of the funds, in the receiver's hands, but that question was not properly in issue in the trial court, was not there decided, and hence is not before us."

Appellants, having failed to plead or argue in the court below that the form of ballot was defective as combining more than one proposition and as failing to give the voter an opportunity to express himself clearly for or against the proposition submitted, and having failed to set forth these points in their statement of points relied upon, the matter is not properly before this court and should not be considered on this appeal.

IV.

A PROPER FORM OF BALLOT WAS USED IN THE ELECTION.

Although appellee feels that the question as to the form of the ballot is not properly before this honorable court, it is nevertheless respectfully submitted that the form of ballot was adequate. It is to be noted at the outset that this is an attempt to contest an election after the completion of the election and the entry of an order consolidating the school districts. Under those circumstances it is well established that minor irregularities will not invalidate an election. An election, after its completion, will not be held void

unless it is clearly illegal and courts generally sustain elections authorized by law if it has been so conducted as to give a free and fair expression of the popular will. See 29 *C.J.S.*, Elections, Sec. 214.

As discussed above, Chap. 93, the statute authorizing this election, makes no provision as to the form of ballot to be used. The judge of the District Court in ordering the election required that the judges of election provide "a form of printed or written ballot suitable for determining the question of whether the voters in each of said districts are in favor of or against the consolidation of said districts . . ." See Tr., page 15. The judges of election under this authorization provided for the following form of ballot:

"Proposal

"Shall the Juneau Independent School District and the Douglas Independent School District be consolidated under the name of Juneau-Douglas Independent School District, in which event the ordinances of the Juneau Independent School District, being the larger of said school districts according to the number of registered voters at the last general election held therein, shall be in effect in such consolidated school district, including the ordinance providing for a 1% tax on retail sales and services, which tax shall automatically become effective in that portion of the Douglas Independent School District located beyond the corporate limits of the City of Douglas, Alaska, upon entry of an order by the District Court consolidating said school districts. In the event of the approval of this proposal by a majority of the

voters of each of said school districts, the order consolidating said school districts shall be contingent on the Common Council of the City of Douglas amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax.

"Each ballot shall set forth the above proposition preceded by the instructions:

'Vote for or against the following proposal by placing an "X" in the appropriate box,' and followed by the words:

For Consolidation ☐
Against Consolidation ☐"

Any reading of this ballot clearly indicates that there was but one proposal set forth therein, namely, whether or not the voters were "For Consolidation" of the Juneau Independent School District and the Douglas Independent School District, or "Against Consolidation." The additional information set forth in the proposal pertains to the result which would follow as a matter of law in the event that the consolidation took place. At the time of the election there was in effect in the portion of the Juneau Independent School District lying outside the corporate boundaries of the City of Juneau a sales and service tax of 1%, the proceeds of which were being used for specified school purposes. The City of Juneau had theretofore authorized one-half of its 2% retail sales and service tax to be used for the same school purposes so that

there was a uniform 1% sales and service tax in effect throughout the Juneau Independent School District for specified school purposes at the time of the election.

The Organic Act of the Territory of Alaska specifies:

> "All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws . . ." See Sec. 48-1-1, ACLA 1949, 48 U.S.C., Sec. 78, Act of Aug. 24, 1912, Chap. 387, Sec. 9; 37 Stat. 514; as amended by Act of June 3, 1948, Chap. 396; 62 Stat. 302.

It thus was required that, upon the consolidation of the two school districts, taxes be uniform upon the same class of subjects. Chap. 93 specifies that, upon consolidation, the ordinances of the larger of the two districts, according to the number of registered voters at the last general election, would become applicable to the consolidated district. See Sec. 8, Chap. 93, SLA 1953. There was still some question due to the fiscal autonomy of municipalities under Alaska law as to whether the sales tax ordinance would automatically become effective within the corporate boundaries of the City of Douglas, which city was within the boundaries of the Douglas Independent School District. The City of Douglas had previously, by referendum vote, approved the following proposal:

> "*Proposal:* Shall the City of Douglas, Alaska, increase the consumer's sales tax, as now levied by Ordinance No. 34 of said City, from 1% to 2% on the sales price of all retail sales, rents

> and services made within the City, the additional 1% tax to be used exclusively for school purposes?"

It thus was within the power of the Common Council of the City of Douglas to authorize the use of the proceeds from a 1% sales tax for the same school purposes as the similar tax which was being levied in the Juneau Independent School District. To obviate any possibility of conflict, the Common Council of the City of Douglas passed its Resolution 201, set forth in the supplemental transcript of record at pages 74 and 75, agreeing to amend its sales tax ordinance so as to provide for the use of the funds for the same purposes as the funds collected under the Juneau Independent School District sales tax ordinance.

It obviously was fair to the voters, particularly to the voters of the Douglas Independent School District, to advise them that, in voting for consolidation, they would become subject to such a tax. Accordingly, this fact was set forth in the proposal. Far from misleading anyone, this additional information clarified the effects of the consolidation so that all voters were properly advised thereof.

The great weight of authority holds that elections held upon similar ballots are valid. Thus in the case of *State v. Osbourne,* decided by the Supreme Court of Oregon on May 12, 1936 and reported in 57 P. 2d 1083, a ballot was provided for an amendment to the state constitution in order to allow verdicts by ten member juries in all cases except first degree murder. The proposition was presented to the voters as

> "Criminal Trial Without Jury and Nonunanimous Verdict. Constitutional Amendment.—Purpose: To provide by constitutional amendment that in criminal trials any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise. Vote Yes or No."

Actually the voters had previously approved the right to waive trial by jury. The court held that the coupling of this provision with the provision pertaining to the ten member findings did not defeat the election, stating:

> "We think that there was surplusage in the ballot title, but such surplusage was not of such a character as to mislead or deceive. The title was not absolutely accurate.
>
> "Neither a lack of absolute precision nor the use of surplusage will vitiate the election.
>
> "It is true that the ballot title does not reflect the fact that a trial without a jury upon waiver thereof by defendant had been prescribed by the amendment of November 8, 1932, and that such amendment was effective when the amendment in suit was submitted to the electorate. The criticism is that the ballot title indicates that both the 'trial without jury' and the 'ten juror verdict' amendments were being submitted, while, in fact, the first of these two amendments had already become part of the Constitution."

In *Yowell v. Mace* (Mo.), 290 S.W. 96, the court considered an election held according to a statute which provided:

> "There shall be written or printed on each ballot voted at said election either of the following sentences: 'For enforcing the law restraining (insert the name of animals in petition) from running at large;' 'against enforcing the law restraining (insert the name of animals in petition) from running at large.' "

Actually at the general election the proposition was set forth at the foot of each of the seven party tickets in the following manner:

> "☐ For enforcing the law restraining horses and mules, asses, cattle, goats, swine and sheep from running at large. Yes.
>
> ☐ For enforcing the law restraining horses and mules, asses, cattle, goats, swine and sheep from running at large. No."

The court held that the statute setting forth the type of ballot nowhere prescribed what would be the result of failure to use the form of ballot provided by the statute and that, under these circumstances, the statute would be regarded as directory rather than mandatory, stating:

> "From these authorities it is quite clear that the statute here involved is directory merely, and, unless the ballot be in such form as to prevent a free expression of the voter's will, it should not be cause for holding the election invalid. Under the facts with which we are confronted, there is no

reason to believe the voter could have been misled or confused by the ballot used."

In *Williamston Graded Free School District v. Webb,* 89 Ky. 264, 12 S.W. 298, a proposition was presented to the voters as to whether a tax should be levied for establishment and support of a school district. It was held that this was sufficient compliance with the statute requiring a submission of the question of whether such a school district should be established. The adding of the provision pertaining to the levying of a tax for the support of the district was considered as surplusage, in no manner invalidating the election, the court holding:

". . . submission of a proper proposition is not invalidated by the inclusion of a further matter on which the voters know they have no authority to pass or take action."

In *State v. Stouffer* (Mo.), 197 S.W. 248, an election was held to determine whether the voters desired consolidation of school districts. The statute required that the ballots contain a proposition "For Organization" or "Against Organization". The ballots actually used contained the wording "For Consolidation" and "Against Consolidation". This was held a sufficient compliance with the statute.

In *Critten v. New* (Mo.), 212 S.W. 46, the proposition for consolidation of districts was set forth as follows:

"Do you favor the consolidation of the two old districts into a new one, the schoolhouse of the latter to be centrally located on the public road?"

The court held:

> "Indeed, strictly speaking, the selection of a site was not before the two old school districts, and what plaintiffs claim to be two propositions was simply one, namely, should the two districts be consolidated into one district with the school to be located in the center of the district and on the public highway . . . We do not see how that the provision that the schoolhouse, if the consolidation was effected, should be centrally located and on a public road, rendered the proposition to consolidate, or the vote thereon invalid, especially as that is the location which the statute favors."

Similarly in the case at bar, it is difficult to see how the provision that the same sales tax be effected throughout the consolidated district, in the event of consolidation, could render the proposition to consolidate or the vote thereon invalid, especially as the Organic Act provisions for uniformity in taxation requires that the sales tax be applicable throughout the consolidated district.

An annotation on a subject closely related to the issues raised by counsel for appellants pertaining to the matter contained in the ballots is to be found in 122 A.L.R. 1142. It is therein stated:

> "Although of course the extent and deceptive nature of any particular inclusion of extrinsic or foreign matter in a notice of a special election are largely determinative of the question whether such inclusion may be regarded as being so immaterial or harmless as not to affect the validity of the election, or as being so misleading as to vitiate the election, it may be noted that in practically all

> of the cases involving the point, the extraneous matter has been of a sort which has not been so objectionable as to mislead the voters, or at least has not been shown to have done so."

A number of cases are cited in this annotation, some of them involving inclusion of extraneous matter in the ballot and others involving the inclusion of matter in the notice of form of election. In all of the cases which are remotely similar to the facts involved in the case at bar, the elections were upheld.

In the case of *Brennan v. Black,* decided by the Supreme Court of Delaware April 27, 1954 and cited at 104 A. 2d 777, a statute provided for voting upon a ballot form as follows:

"For Additional Tax ☐
Against Additional Tax ☐"

Instead of the ballot being in the form prescribed by the statute, two separate ballots were used, one stating

"For Additional Tax ☐"

and the other ballot providing

"Against Additional Tax ☐"

It was held that the election should not be set aside on that ground.

Similarly, in *Sisco v. Caudle,* decided by the Supreme Court of Arkansas in 1947 and reported at 198 S.W. 2d 992, where a proposal for construction of a county hospital indicated that it was an "Initiated Act" which it was not, the court held that the validity of the election was not affected.

Counsel for appellants in his brief contends that it is not possible to determine what the voters desired in voting for the proposal contained in the Juneau-Douglas Independent School Districts consolidation election. It is respectfully submitted that no voter could have been deceived by the form of the proposal, and certainly no voter in the position of appellants could have been misled into voting for the proposal since the additional information contained in the ballot merely explained the resulting tax which would be involved to the voters of the Douglas Independent School District upon their voting in favor of consolidation. If anything, the additional material would have resulted in increasing the negative vote, and certainly those residents of the Douglas Independent School District who were opposed to consolidation can claim no prejudice as a result of the form of ballot.

V.

THE VALIDITY OF THE CITY OF DOUGLAS CONSUMER'S SALES TAX IS NOT PROPERLY BEFORE THIS COURT.

Counsel attempts to raise a collateral issue pertaining to the validity of the City of Douglas consumer's sales tax. There is no statement contained in the petitions filed by appellants with the District Court to the effect that the existing sales tax ordinance of the City of Douglas is invalid. This subject is being raised for the first time on this appeal. No mention of this point is made in appellants' statements of points. Under these circumstances it is respectfully submitted

that this issue should not be considered by this honorable court (see the authorities cited supra pertaining to the similar new contention of appellants in regard to the form of ballot under Section III of this brief).

Moreover, appellants have shown no particular danger of sustaining some direct injury which would justify this court's considering an attack on the validity of the City of Douglas sales tax ordinance. A similar situation was presented to this court in the case of *Sheldon v. Griffin*, 174 F. 2d 382 at 384, wherein it was stated:

> "There is nothing in the pleading or proof to indicate that the plaintiff has a particular right of his own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. To entitle himself to be heard he is obliged to demonstrate not only that the statute he attacks is void but that he suffers or is in imminent danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people."

To the same effect is the case of *Frothingham v. Mellon,* 262 U.S. 447-488, 43 S.Ct. 597, 67 L.Ed. 1078, wherein it is stated:

> "The party who invokes the power (of the courts to declare a legislative enactment invalid) must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining, some direct injury as the result of its enforcement, and not merely that

> he suffers in some indefinite way in common with people generally."

The reasons set forth above for the courts not intervening in regard to the validity of legislative enactments in the absence of a showing of special injury to the contest applies with equal force to the subject situation where a collateral attack is being attempted upon the validity of the sales tax ordinance of the City of Douglas.

VI.

THE CITY OF DOUGLAS SCHOOL SALES TAX IS VALID AND MAY BE AMENDED SO AS TO CONFORM TO THE JUNEAU INDEPENDENT SCHOOL DISTRICT AND CITY OF JUNEAU SALES TAXES.

It is true that the statute authorizing municipalities to pass consumer's sales taxes requires that a referendum be held and that a majority of the votes cast must be in the affirmative in order for an ordinance to be legally enacted. The statute specifies:

> "The ballot shall also set forth whether the tax is to be levied for general revenue for the municipality or for a special purpose, and, if for a special purpose, same shall be specified on the ballot." See Chap. 121, SLA 1953.

The District Court could well take judicial notice of the fact that the City of Douglas had an election on April 20, 1954, voting upon the following proposal:

> "*Proposal:* Shall the City of Douglas, Alaska, increase the consumer's sale tax, as now levied

> by Ordinance No. 34 of said City, from 1% to 2% on the sales price of all retail sales, rents and services made within the City, the additional 1% tax to be used exclusively for school purposes?"

and that the election resulted in 88 votes in favor of the proposal and 30 votes opposed to the proposal. Thereby the Common Council of the City of Douglas was duly authorized to enact a 1% sales tax for school purposes. Since the proposal voted upon at the consolidation election specified that the election be contingent upon the Common Council of the City of Douglas "amending its 2% retail sales and service tax ordinance so that one-half of the revenues thereof shall be used exclusively for the purposes set forth in the ordinance providing for the Juneau Independent School District retail sales and services tax", and since the Juneau Independent School District tax is exclusively used for school purposes, there is no legal obstacle to the City of Douglas amending its ordinance in conformity with the authority given it by its voters in the referendum of April 20, 1954. The amended ordinance is well within the authorization granted by the voters. This honorable court may take judicial notice of the fact that a mandamus action is now pending in the United States District Court for the District of Alaska, Division Number One at Juneau, by the Juneau-Douglas Independent School District against the City of Douglas and its Common Council for the purpose of requiring the City of Douglas to enact such an amendment to its

sales tax ordinance and to apply half of the funds presently being collected under its 2% sales tax to the same school purposes as the similar tax being collected in the remaining portions of the Juneau-Douglas Independent School District.

It is true that the facts pertaining to the Douglas election of April 20, 1954 do not appear in the transcript of record on this appeal. It is submitted, however, that appellants, if they had any intention of contesting the validity of the tax on the basis of lack of authorization from the voters, should have pleaded specifically that no referendum was ever held in the City of Douglas authorizing enactment of a tax for school purposes. Such pleading has not been made and could not be made since the facts are as set forth above.

Counsel also argues that the authority given municipalities to enact sales tax ordinances, which authority was originally set forth in Chap. 38, SLA 1949, was in effect repealed by Chap. 47, SLA 1951. It is true that Chap. 47, SLA 1951, amended subsection 9 of section 16-1-35, ACLA 1949, as amended by Chap. 38, SLA 1949, by making a change pertaining to subsection (a) dealing with the general tax for school and municipal purposes. It is further true that this amendment omitted subsection (b), being the authorization for a consumer's sales tax. It is noted, however, that the title of Chap. 47, SLA 1951, makes no mention of repealing subsection 9(b), (the authorization for a consumer's sales tax). The title to the act reads as follows: "Amending subsection Ninth of

Sec. 16-1-35 ACLA 1949, as amended by Ch. 38 S.L.A. 1949, pertaining to a general tax for school and municipal purposes." The Organic Act of Alaska requires that "no law shall embrace more than one subject which shall be expressed in its title." See Section 4-3-1, ACLA 1949, 37 Stat. 514, 48 U.S.C., Sec. 76. The title to the act reveals that there was no intent to repeal the consumer's sales tax law, and it is quite clear that it was merely by inadvertence that subsection (b) was not set forth again in Chap. 47 of SLA 1951.

Moreover, the Douglas city sales tax, as far as the tax for school purposes is concerned, is not dependent upon the act in effect in 1951. As indicated above, the people of Douglas voted for a school sales tax in 1954 after the passage of Chap. 121, SLA 1953, which again set forth the authorization for a consumer's sales tax. The fact that the original Douglas consumer's sales tax was authorized by the voters and was passed in 1952 does not affect the right of the City of Douglas to enact a tax under the authorization granted in 1954. It appears to us that it should not be necessary to trace the tortuous course of Alaska sales tax legislation in this case as, for the reasons set forth in the section above, it is felt that this issue is not before this court at this time. In any event, it is respectfully submitted that the Common Council of the City of Douglas does have the authority, without any further referendum, to amend its sales tax ordinance so as to provide for uniform taxation throughout the Juneau-Douglas Independent School District.

The Common Council of the City of Douglas agreed so to amend its sales tax ordinance by Resolution 201 prior to the election and, as soon as this case is disposed of or as soon as a decision is rendered in the mandamus action now pending in the District Court, the contingency set forth in the ballot proposal should be satisfied.

Furthermore, the Common Council of the City of Douglas, having passed Resolution 201 and an election having taken place partially in reliance on that resolution and the school districts having been consolidated, it would appear that the Council is estopped from taking a contrary position. See *Getz v. City of Harvey,* 118 F.2d 817 (C.C.A. 7), wherein it is stated:

> "Where a city council has formally voted on a proposition, and there is no motion for reconsideration, the council may not reconsider its action if the rights of other persons have intervened."

CONCLUSION.

The learned trial court entered its order consolidating the Juneau and Douglas Independent School Districts on March 18, 1955, the order becoming effective on April 1, 1955. Since that time the two school districts have been administered as a consolidated district. Changes have been made in the construction of schools, number of teachers, finances, etc. Tremendous disruption and confusion would inevitably result from a reversal of the learned trial court's

denial of the appellants' petitions to set aside the order of consolidation, and it is respectfully submitted that such a decision should only be made in the event of the strongest of arguments. In the subject case appellants have shown no right to come before this court on this procedure to contest the election in view of the statutory method set forth by Alaska law in Sec. 56-4-2. The proposal upon which the voters by a substantial majority approved consolidation was set forth in a form which clearly permitted the voters to express their opinion. The objections now raised to the form of ballot were not properly brought before the court below or set forth in the statement of points relied upon in this appeal. It is respectfully submitted that appellants have presented no reason justifying the setting aside of the order of consolidation and that the prevailing legal reasons as well as public interest indicate that the decision of the trial court denying appellants' petitions be affirmed.

Dated, Juneau, Alaska,
February 3, 1956.

FAULKNER, BANFIELD & BOOCHEVER,
By R. BOOCHEVER,
Attorneys for Appellee.

No. 14,856

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM RICHARDS, CLANCY HENKINS, JOSEPH L. RIEDI, ROBERT S. SCHY and LOIS LANE,

Appellants,

vs.

JUNEAU INDEPENDENT SCHOOL DISTRICT and DOUGLAS INDEPENDENT SCHOOL DISTRICT, to be known as Juneau-Douglas Independent School District,

Appellee.

Upon Appeal from the District Court for the District of Alaska, First Division.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

I.

AN OBJECTION TO THE FORM OF REMEDY USED WILL NOT BE HEARD FOR THE FIRST TIME ON APPEAL.

Appellees contend that appellants have made use of the wrong remedy in this action. This objection is made for the first time on appeal. Where a party fails to object to the form of action used at the trial level,

he will not be heard to object for the first time on appeal.

Marine Bank v. Fulton Bank, 69 U.S. 252 (1864);

A. A. Excavating Co. v. First United Finance Co., 52 N.E. 2d (Ill. App.) 837 (1944);

First National Bank of Klemme v. Beier, 26 N.W. 2d (Iowa) 853 (1947);

Marshall v. Heselschwerdt, 6 N.W. 2d (Mich.) 871 (1943);

Taylor v. Independent School District, 164 N.W. (Iowa) 878 (1917);

City of Miami Beach v. Perell, 52 So. 2d (Fla.) 906.

But, appellees' argument goes even further. The contention is that appellants should have proceeded under a statutory action which may be maintained under the direction of the Governor of Alaska, since the writ of *quo warranto* has been abolished in the Territory and this statutory proceeding has been established in lieu thereof.

If this argument is correct, then Section 56-4-1, ACLA 1949, which abolishes the writ of *quo warranto,* is contrary to the provisions of the Organic Act of Alaska as a usurpation by the legislature of the power of the District Court to issue writs of *quo warranto.*

Section 4-2-6, ACLA 1949, provides:

"The legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exer-

> cised by like judges or officers of district courts of the United States."

This section is part of the Organic Act of Alaska.

28 USCA 1651(a) provides that:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Thus, the District Court has power to issue a writ of *quo warranto* by Act of Congress.

The use of writs of *quo warranto* in District Courts is recognized by the Federal Rules of Civil Procedure in Rule 81(a)(2).

Therefore, the use of a writ of *quo warranto* would be open to appellants.

> *Cp. Ex parte Beattie,* 124 So. (Fla.) 273 (1929);
>
> *State v. Wymore,* 119 S.W. 2d (Mo.) 941 (1938).

This being so, then the rule that an objection to the form of remedy used will not be heard for the first time on appeal applies to this case.

But, even should this Court be reluctant to strike down an act of the Territorial Legislature, appellants could still bring an action without the direction of the Governor under Section 56-4-4, ACLA 1949, which provides:

> "An action may be maintained in the name of the United States upon the information of the United States attorney or upon the relation of a private party against the person offending in the following cases: * * * Third. When any association or number of persons act within the Territory as a corporation without being duly incorporated."

This statute would give the same result as would the writ of *quo warranto.*

The cases of *Rister v. Plowman* and *Village of Metamora v. Village of Eureka* (Page 5, Brief of Appellees) cited by appellees are not in point. They were cited on the supposition that Section 56-4-2, ACLA 1949, applies to this case and that, therefore, the Governor must give his direction to bring the action and he must be joined. As has been pointed out, if this result is compelled by Section 56-4-1, ACLA 1949, et seq., then these statutes are contrary to the provisions of the Organic Act and are void, at least in this application. However, as pointed out, appellants urge that Section 56-4-4, ACLA 1949, applies to this case and the Governor's direction would not, in any event, be required to bring the action. Thus, the Governor need not be joined.

The remainder of the cases cited under appellees' first point (see Brief, pp. 6 and 7) are not pertinent because appellees are not now in a position to question the form of remedy used by appellants.

Thus, all the issues are now before this Court as they would have been had the writ of *quo warranto*

been used by appellants. This Court is in the same position to decide the case now as it would have been had another remedy been used. The rule that the form of remedy cannot be questioned for the first time on appeal does apply and this Court is now in a position to decide the case at bar.

II.

THERE IS NO STATUTORY AUTHORITY FOR THE ELECTION HELD.

There is authority for the submission of the question as to whether a consolidation is desired by the voters. There is no authority for the submission of a question as to whether the voters want a consolidation and whether they want it to be contingent on passage of a tax ordinance.

This objection does not run to the form of the ballot. No form of ballot is prescribed by Chapter 93, SLA 1953. Presumably any form that fairly presented the question authorized to be put could be used.

However, the question authorized was not put to the voters at all in this election. Thus, Chapter 93, SLA 1953, cannot be authority for this election.

III.

THE QUESTION AS TO THE FORM OF BALLOT USED IN THE ELECTION IS PROPERLY BEFORE THIS COURT.

Appellees contend that the question of the form of the ballot is not raised in appellants' statement of

points. This question is clearly raised in the statement by Points 2 and 3 (See P.R. 66). Appellants' statement of Point 2 (P.R. 66) reads as follows:

> "The Trial Court erred in making and entering its order of March 18, 1955, based upon ballots that did not conform to the Laws of the Territory of Alaska and the District Court order of election entered herein on January 21, 1955."

and appellants' statement of Point 3 (P.R. 66) reads as follows:

> "That the combined proposal and ballot used at the election of March 8, 1955, was contrary to law, and there was no law in the Territory of Alaska authorizing such combined proposal and ballot or such a ballot as was used at the election of March 8, 1955, in accordance with the Order of the District Court dated January 21, 1955, ordering the election on the proposed consolidated school district."

The ballot used in the election in the case at bar was so drawn that it clearly combined two separate and distinct propositions which is contrary to law. Therefore, the case of *Western National Insurance Co. v. LeClaire* cited by appellees (page 9 of Appellees' Brief) is definitely not in point.

Appellants submit their contention that the form of ballot used at the elections was defective and contrary to law was duly presented to the Court below since the ballot form is set out *verbatim* in both petitions of appellants (P.R. 37-43-44) and was strenuously argued in open Court. Moreover, appellants call the attention of this Honorable Court to the

fact that the ballot shows on its face that it doesn't conform to the District Court's "Order Calling for Election" (P.R. 14-17). For these reasons the argument of appellees and cases cited (Appellees' Brief, pages 8-9-10) are not valid or in point.

IV.

NO PROPER LEGAL FORM OF BALLOT WAS USED IN THE ELECTION.

It is true that the words in front of the little boxes in which the voter was to place his "X" told him that his vote would be counted "For Consolidation" or "Against Consolidation". But, any voter that read the ballot would know that by voting affirmatively or negatively he would also be voting for or against the proposition whether or not the consolidation would be contingent upon amendment of the Douglas City sales tax. This cannot be regarded as surplusage or merely informative matter. It is clearly put forth in the form of a proposition which the voter accepts or rejects.

The case of *State v. Osbourne,* cited at page 14 of appellees' brief, did not involve a ballot containing two propositions at all. One of the matters was already a part of the State Constitution, and, thus, was, in fact, surplusage. That cannot be said of either of the propositions presented by the ballot involved in the case at bar. Also, in the *Osbourne* case, neither proposition involved a contingency. It must be recognized that a ballot framed around the contingent oc-

currence of another event may be very tricky for the voter. Thus, the *Osbourne* case is not in point.

Williamston Graded Free-School District v. Webb, cited at page 17 of appellees' brief, is also distinguishable from the case at bar in its essential features. In that case a statute authorized a vote on the question of whether the voters wished to create a school district. The question put by the ballot was whether there should be a tax for the purpose of maintaining this school district. The Court held that this amounted to substantial compliance with the statute since the voter would know that if the tax were approved there would be a school district. The ballot contained only one proposition. That proposition did not contain any contingency. The voters, themselves, did have the power to levy the tax. The decision in that case turned on the Court's feeling that the proposition was made clear to the voter. These factors are not present in the case at bar. Thus, it is felt that the case is not in point, although the result is questionable as not being in line with other cases which have considered the points raised.

The case of *Critten v. New,* from which appellees quote at page 17 of their brief is far from being in point. The election there held was to decide the question of whether two school districts should consolidate. It was held at a meeting in each of the old school districts. The voters at these meetings knew that they only had authority to vote on the question of whether there should be a consolidation. The opinion of the Appellate Court brings out as a point of con-

trolling significance the fact that it was clearly recognized and understood by the voters at the meetings that they only had power to vote on the consolidation issue and that their action on the location of the schoolhouse site would be advisory only. Thus, the voters were really only voting on one proposition.

The cases of *Yowell v. Mace* (page 16 of Appellees' Brief), *Brennan v. Black* and *Sisco v. Caudle* (both at page 19 of Appellees' Brief), involved such minor deviations from the prescribed statutory form that the authorized question was still before the voters. None involved such a basic abandonment of the proposition authorized by statute as is involved in the case at bar.

The annotation at 122 A.L.R. 1142 (page 18 of Appellees' Brief) is not precisely in point, as it involves notices of a special election. Still, it is related to the issues in the case at bar and it does point out that where extraneous matter is misleading it will vitiate an election. This is one of the objections appellants are making, and it is evident that where two propositions are submitted to the voters as one, and one of the propositions is framed upon the contingent happening of another event, the result will be to mislead the voter.

V.

IF THE CITY OF DOUGLAS SCHOOL SALES TAX WAS VALID WHY WAS THE ELECTION BALLOT BASED ON A CONTINGENCY, AND HOW COULD A VALID AND LEGAL ORDER OF CONSOLIDATION BE ENTERED BEFORE THE SAID CONTINGENCY WAS FULFILLED?

If learned counsel is correct in his argument that an election was held in the City of Douglas on April 20, 1954, and the City of Douglas had a right to increase its Consumer's Sales Tax from 1% to 2% with the additional 1% tax to be used exclusively for school purposes, why was the election ballot so drawn so that the voters were obliged to vote on a contingency? No facts pertaining to any such election appear in the transcript of record on this appeal, and no proof was ever offered and the District Court was not requested to take judicial notice of any such election, and there is nothing in the record on this appeal to show that judicial notice was taken of any such fact.

Moreover, counsel argues at page 12 of his brief that any reading of the ballot clearly indicates that there was but one proposal set forth therein, namely, whether or not the voters were "For Consolidation", or "Against Consolidation". However, he then argues on page 26 of his brief that consolidation was contingent upon the City of Douglas amending its sales tax ordinance. He thereby admits that there were two propositions or contingencies on the one ballot. He also admits that the City of Douglas has refused to amend its sales tax ordinance and that a mandamus action is now pending in the District Court to force the City of Douglas to amend its sales tax ordi-

nance. This proves the entire argument of appellants that the ballots at the election were contingent upon the City of Douglas amending its sales tax ordinance, and that the City of Douglas has not amended its said ordinance, and that the District Court erred in making and entering its order of March 18, 1955, establishing Juneau-Douglas Independent School District, contrary to law and before the contingency set forth in the ballot was fulfilled.

CONCLUSION.

Since the trial Court entered its order of March 18, 1955, no change has been made in the operation of the schools in Juneau and Douglas in ignorance of the fact that this action has been pending. All concerned have been aware that there has been a serious question as to the validity of the election. A reversal of the trial Court's denial of appellants' petitions would mean nothing more than that the schools would once more conduct their affairs as they did before the election. In fact, the consolidation is not working out satisfactorily, as some students must be transported from Douglas to Juneau and others from Juneau to Douglas.

Appellants do have a right to question the validity of this election which Sections 56-4-1 and 56-4-2, ACLA 1949, cannot take away. In any event, they do have such right under Section 56-4-4, ACLA 1949.

In the election the voters were misled and confused in a number of ways. They had legal, if not actual, fraud practiced upon them.

It is respectfully submitted that the order appealed from should be reversed and the election should be declared void. Then, if it is desired, another election could be held and the issue fairly presented to the voters.

Dated, Juneau, Alaska,
February 22, 1956.

M. E. MONAGLE,
ROBERTSON, MONAGLE & EASTAUGH,
Attorneys for Appellants.

No. 14,857

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD YAW, also known as Dickyman,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLEE.

LOUIS B. BLISSARD,
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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,857

IN THE

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BRIEF FOR APPELLEE.

STATEMENT OF JURISDICTION.

The Appellee agrees with the Appellant's statement concerning the pleadings and jurisdiction.

STATEMENT OF FACTS.

The Appellee disagrees with Appellant's Statement of Facts.

Essentially the facts as presented in this case in their most favorable light to the Government are as follows:

On September 30, 1954, at about 3:00 P.M., John Cho, an undercover Police Officer, together with a Special Employee of the Bureau of Narcotics, talked with the defendant, Richard Yaw, in the vicinity of Lanikila Food Center (Tr. pp. 15-16). Richard Yaw was at that time sitting in Lanikila Park, directly across the street from Lanikila Food Center (Tr. p. 16). The Special Employee approached Richard Yaw and brought him to the car in which the undercover Police Officer was sitting. There, in the exact words of the undercover Police Officer: "I told him what my purpose was, to purchase marihuana cigarettes, and he told me that he did not have any with him, that his brother, Robert, could get some for me." (Tr. p. 17). Upon further questioning, the undercover Police Officer stated: "Well, he said Robert was not in because he went fishing for the afternoon, and he told me to come back that evening and that Robert could get some for me." (Tr. p. 17). Further, Officer Cho testified concerning an appointment with Robert Yaw that he had made with Richard Yaw: "And so I made an appointment through Richard with Robert to purchase marihuana cigarettes. So I made an appointment for 7:00 P.M. that evening . . ." (Tr. p. 17).

The Undercover Police Officer then left the vicinity of Lanikila Food Center and called Agent Bautista of the Bureau of Narcotics for further instructions. He was instructed to return at 7:00 P.M. and attempt to make a buy from Robert Yaw (Tr. p. 17). He did return at 7:00 P.M. (Tr. p. 17). Further, he testified

as follows concerning the initial meeting with Robert: ". . . and I walked up to Robert and I told him I was the fellow who talked to Richard that afternoon about marihuana cigarettes, and Robert showed an indication that Richard talked to him that afternoon. And he told me, 'Let's wait a while.' So I did . . ." (Tr. p. 17).

Officer Cho further testified that September 30, 1954 was the first time that he had ever seen Richard Yaw or Robert Yaw (Tr. pp. 82-83). As pointed out in the Brief of the Appellant, an inference from the above facts was drawn that the appointment was made and effectuated by Richard Yaw with his brother Robert for 7:00 P.M. and that, as appears from the Transcript, Robert and one Edward Joseph Peltier thereafter sold ten (10) marihuana cigarettes to Officer Cho that evening.

SUMMARY OF ARGUMENT.

The Appellee contends that there was substantial evidence to support the verdict of the jury under 18 U.S.C., Section 2, and that the trial judge did not err in admitting as evidence ten (10) marihuana cigarettes. It is contended that in order to prove that a person is guilty under Section 2, it is necessary to prove that there is also a guilty principal. In this case the Appellee had two ways in which to prove that there was a guilty principal. Both of them were used. Appellant objects to the fact that in order to show that the principal, Edward Joseph Peltier,

was guilty, that ten (10) marihuana cigarettes were used to show commission of the offense as contemplated by Section 2593(a) of Title 26, U.S.C.

ARGUMENT.

As has been related above the facts concerning the Appellant have a different cast to them when viewed in their most favorable light. Considering whether there is substantial evidence to sustain the verdict this is the standard which must be used.

The case which most favors the Appellant and which is heavily relied upon by him is *U. S. v. Moses,* 220 F. (2d) 166 (Appellant's Brief p. 6), at page 169 it is stated, "Moreover, emphasis on those facts which show collaboration and association is characteristic of judicial analysis in those cases where convictions of aiding and abetting have been sustained (and authorities cited)".

The distinguishing characteristic of *U. S. v. Moses, supra,* is the emphasis placed upon association with the undercover officers rather than with the defendants. But here the situation is reversed. Richard Yaw is Robert Yaw's brother. Here Richard made an appointment for a meeting with his brother (Tr. p. 17); his brother kept the appointment at the appointed place and time (Tr. p. 17). Brother Robert was aware that the undercover police officer would be there. There was no surprise—no negotiations, it was just a matter thereafter of securing the mari-

huana (Tr. p. 17). Further there is one important bit of evidence which needs emphasis. Officer Cho had never met nor seen either Richard or Robert Yaw prior to September 30, 1954 (Tr. pp. 82, 83).

Consequently, we have here what might be termed in the words of Third Circuit the proper association of the defendant with the principal actors in the offense Robert Yaw and Edward Peltier.

Appellant emphasizes that all the Appellant was guilty of doing if anything was aiding and abetting an aider and abettor. However, it is not necessary for an accessory to know the person procured, *Morei v. U. S.,* 127 F. (2d) 827, nor is it necessary that the accessory communicate directly with the principal, but this may be done through a third person as was done here. *U. S. v. Pritchard* (D.C. D.C. 1944) aff., 145 F. (2d) 240.

Referring to the cases cited and relied upon by the Appellant, Appellee wishes to comment on each.

U. S. v. Moses, supra, has been discussed herein and it has been shown that the facts distinguish it from the facts herein. The association here is with the other defendants rather than with the police officers. As has been pointed out *supra* this case lends support to Appellee's position.

U. S. v. Peoni, 100 F. (2d) 401, 402, (2d Cir. 1938) sets out a test for aiders and abettors which was to some extent approved in *Nye & Nissen v. U. S.,* 336 U.S. 613, 619. In *Peoni,* however, there is an interesting preamble to the statement at page 402, "It will

be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct, . . ." In *Nye & Nissen, supra,* at page 620, the Court states, "Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing." Further Appellant relies on the fact situation in the *Peoni* case. Even a casual study will show that the facts therein have little or no relation to the facts of this case. *Peoni's* factual situation embraced a series of crimes. There the perpetrator of the first offense was attempted to be linked with the perpetrator of the third offense. Consequently, there is really no comparison to be made. For if there was insufficient evidence to allow the case to go to the jury (point 1) then there must have been insufficient evidence for the jury to return a verdict of guilty (point 2). Points 1 and 2 of Appellant's argument in reality cover the same ground that there was insufficient evidence.

It is the position of Appellee that neither point is well taken and that both cases cited by Appellant and by Appellee bear out this contention. To further bolster this argument this court is respectfully referred to 18 U.S.C. 2(b). It is the contention of Appellee that this section opens up a separate field separate and apart from aiders and abettors and serves to give further grounds for sustaining the judgment herein. *U. S. v. Chiarella* (2d Cir. 1950), 184 F. (2d) 903, modified on other points 187 F. (2d)

12, reargument denied 187 F. (2d) 70; vacated as to sentencing [187 F. (2d) 70], 341 U.S. 946; cert. denied as to 184 F. (2d) 903, 341 U.S. 956. The *Chiarella* case, 184 F. (2d) 903, states:

> Before the amendment of §2 in 1948, the last and an authoritative expression as to what constituted criminal liability was that "in order to aid or abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.' "[11]

[11]Nye & Nissen v. U.S., 336 U.S. 613, 619, 69 S.Ct. 766, 769, 93 L.Ed. 919; International Brotherhood v. N.L.R.B., 2 Cir., 181 F.2d 34, 38, 39.

> To do that involves much more than merely "causing an act to be done," as we pointed out at length in United States v. Falcone.[12] Unless

[12]2 Cir., 109 F.2d 579, 587; affirmed 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128.

> we beg the question by importing in to the word, "cause," the limitations of "abet," "aid" or "procure," "causing an act to be done" covers any acts which are necessary steps in the events that result in the crime; and that is equally true *pro tanto,* though we limit the steps to those which the actor knows to be likely so to result; for, even with that limitation there are many situations in which one may "cause" the crime, and yet not "abet," "aid" or "procure" its commission.

It is observed that this case puts a new slant on Appellant's participation. "Causing an act to be

done" covers any acts which are necessary steps in the events that result in the crime. It would seem to the Appellee that to produce the prospect and to make the necessary appointment are certainly necessary steps that result in the crime, even with the limitation to "those events which the actor knows are likely to result." Neither can it be said that the Appellant did not know that his brother even by himself or in concert with another would consummate a deal concerning marihuana.

It is contended that under either theory that the evidence is sufficient to sustain the verdict of the jury.

Point III of Appellant's brief raises the point that prejudicial error was committed in admitting in evidence the ten (10) marihuana cigarettes. It is essential that in order to convict a person under 18 U.S.C. 2 that there must be a guilty principal. In this case the Government had two ways to prove this. Both were used. The principal was proved guilty by evidence to all the essentials of the offense. It is essential that the marihuana cigarettes were part of this proof. How can marihuana be acquired and obtained unless there is marihuana? Secondly, the conviction of the principal was shown and that also is prima facie evidence of the principal's guilt. *Colasacco v. U. S.* (10th Cir. 1952), 196 F. (2d) 165.

CONCLUSION.

The evidence as viewed in its most favorable light establishes that Appellant aided and abetted the principal herein and he also "caused an act to be done," which was necessary to the commission of the offense. The admission of the ten (10) marihuana cigarettes may have been prejudicial to the Appellant but it was not error since it was part of the proof of the guilt of the principal. It is submitted that the judgment should be affirmed.

Dated, Honolulu, T. H.,
October 3, 1955.

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United States
COURT OF APPEALS
for the Ninth Circuit

GLADYS LAYCOCK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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United States
COURT OF APPEALS
for the Ninth Circuit

GLADYS LAYCOCK,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

STATEMENT OF THE PLEADINGS AND FACTS

This is an action for damages for the taking of plaintiff's property without just compensation in violation of the due process clause of the Fifth Amendment to the Constitution of the United States of America. Jurisdiction of the District Court was invoked under the Tucker Act, section 1346 (a) (2) of Title 28 of the United States Code, 1948 Edition, as referred to in plaintiff's complaint (Transcript of Record 3; hereinafter abbreviated as (Tr.). Jurisdiction of the Court of Appeals is based upon Title 28, section 1291, U.S.C.A.

Plaintiff is part owner of a gold mine which is lying dormant because of the governmentally enforced price of 35 depreciated paper dollars per fine ounce for her product. With the vastly increased cost of labor, machinery and materials of the present day, she cannot operate her mine profitably at $35.00. It is her theory that the United States can take her gold under its power of eminent domain if it so desires, but in doing so, it is obliged to pay her a fair market price therefor. $35.00 is not a fair market price and therefore she is being deprived of her property without due process of law.

In Paragraph I of her complaint she bases jurisdiction upon the Tucker Act, which makes provision for the District Courts of the United States to act as limited courts of claims to the extent of $10,000 (Tr. 3).

In Paragraph II she sets forth the interest that she owns in patented gold mining properties in Grant County, Oregon.

In Paragraph III she sets forth the derivation of her title dating back to a recorded Patent signed by President Roosevelt on February 23, 1906, guaranteeing the right to hold said mining premises, "together with all of the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to its successors and assigns forever".

In Paragraph IV she alleges the development work which has been done and that there has been no activity because the property cannot be economically worked

when compensation is made in terms of a set amount of depreciated paper currency.

In Paragraph V she pleads the Trading with the Enemy Act of 1917, (40 Stat. 415) as amended in 1933, (48 Stat. 1) and in Paragraph VI the Federal Reserve Act of 1934. (48 Stat. 337).

In Paragraph VII she alleges the consequences of those Acts, namely:

(1) Prohibiting the holding of gold;

(2) Denying the right to sell to anyone other than the United States Government and its agents who possess licenses;

(3) Imposing license requirements on producers and fixing an arbitrary and mandatory price for the product.

In Paragraph VIII she alleges that the inconvertible paper currency that she is forced to take for her product has depreciated to the extent that she has been prevented from making lawful use of her property.

In Paragraph IX she sets out her Constitutional grievances with the Gold Reserve Act of 1934, namely:

(1) The powers sought to be exercised by Congress and the Executive exceeded those delegated to them by the Constitution;

(2) Commodity gold is not a proper subject matter for licensing and regulation by the Government;

(3) Congress' power to coin money and regulate its value does not give it power to set up a monopoly at an arbitrary price with respect to gold; and

(4) Allowing the Executive branch to regulate was in itself an unconstitutional delegation of legislative powers.

Paragraph X alleges her Constitutional grievances with the Trading with the Enemy Act on the grounds that:

(1) Powers of Congress were exceeded;

(2) Commodity gold is not a proper subject matter for licensing and regulation by the Government;

(3) The Executive was not given authority under the Act to regulate domestically produced gold not held for the account of enemies of the United States;

(4) The regulations exceeded the authority granted;

(5) There was an unconstitutional delegation of legislative powers to the Executive and

(6) At the present time the emergency giving rise to the law and the orders has ceased to exist and, therefore, the law has no further force and effect.

In Paragraph XI of her complaint she alleges that she has been deprived of property without due process of law and without just compensation in violation of the Fifth Amendment to the Constitution; further, that she has been deprived of her Constitutional right to own and make use of private property.

In Paragraph XII she alleges damages to the extent of $10,000.00 in order to stay within the Tucker Act and she has alleged that damage has occurred during the past two years, thereby coming well within the statute of limitations and waiving all damages prior thereto. The damages alleged consist of loss of profits and depreciation in value of her property.

In the prayer she asks for judgment in the sum of $10,000.00 (Tr. 10).

The provisions of the Trading with the Enemy Act pertinent to the instant appeal are as follows:

> "(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities." (48 Stat. 1)

Executive Order No. 6260 was issued pursuant to claimed authority under the foregoing quoted provisions of the Trading with the Enemy Act. Section 4 of the Order provides in part as follows:

> "Acquisition of Gold Coin and Gold Bullion.—No person other than a Federal Reserve bank shall after the date of this order acquire in the United States any gold coin, *gold bullion,* or gold certificates except under license therefor issued pursuant to this Executive order * * * Licenses issued pursuant to this section shall authorize the holder to acquire gold coin and gold bullion only from the sources specified by the Secretary of the Treasury in regulations issued hereunder."

Section 5 of Order 6260 provides in part as follows:

> "Holding of gold coin, gold bullion, and gold certificates.—After 30 days from the date of this order no person shall hold in his possession or retain any interest, legal or equitable, in any gold

Note: All italics herein supplied unless otherwise indicated.

coin, *gold bullion*, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive order."

Section 6 of Order 6260 provides in part as follows:

"Earmarking and export of gold coins and gold bullion.—After the date of this order no person shall earmark or export any gold coin, gold bullion, or gold certificates from the United States, except under license therefor issued by the Secretary of the Treasury pursuant to the provisions of this order."

Section 9 of Order 6260 provides in part as follows:

"The Secretary of the Treasury is hereby authorized and empowered to issue such regulations as he may deem necessary to carry out the purposes of this order."

Section 10 of Order 6260 provides that:

"Whoever willfully violates any provision of this Executive order or of any license, order, rule, or regulation issued or prescribed hereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than 10 years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both." (Title 12 U.S.C.A. sec. 95a, 48 Stat. 1)

The pertinent provision of the Gold Reserve Act of 1934 reads as follows:

"The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a)

for industrial, professional and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and (c) for such other purposes as in his judgment are not inconsistent with the purposes of sections 315b, 405b, 408a, 408b, 440-446, 752, 754a, 754b, 767, 821, 822a, 822b, and 824 of this title and sections 213, 411-415, 417 and 467 of Title 12. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or demestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in places beyond the limits of the continental United States." (48 Stat. 340)

The current gold regulations are attached hereto marked "Appendix A".

Section 54.44 of the regulations provides that:

"The mints shall pay for all gold purchased by them in accordance with this subpart $35.00 (less one-fourth of 1 percent) per troy ounce of fine gold, but shall retain from such purchase price an amount equal to all mint charges. This price may be changed by the Secretary of the Treasury without notice other than by notice of such change mailed or telegraphed to the mints." (Appendix A, p. 15)

Section 54.12 provides that:

"Gold in any form may be acquired, held, transported, melted or treated, imported, exported, or earmarked only to the extent permitted by and subject to the conditions prescribed in the regulations in this part or licenses issued thereunder." (Appendix A, p. 7)

Section 54.11 provides as follows:

"Civil and criminal penalties—

"(a) Civil penalties. Attention is directed to section 4 of the Gold Reserve Act of 1934, which provides:

Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of this Act or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of this Act or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred (31 U.S.C. 433).

(b) Criminal punishment. Attention is also directed to (1) section 5 (b) of the act of October 6, 1917, as amended, which provides in part:

Whoever wilfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000 or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term 'person' means an individual, partnership, association, or corporation (12 U.S.C. 95a (3))." Appendix A, p. 6)

STATEMENT OF THE CASE

This is an action brought by a gold mine owner under the Tucker Act to recover damages from the Government for property taken without due process of law. Her theory is that the arbitrary and mandatory price of $35.00 set by the gold regulations under penalty of fine and/or imprisonment is outright confiscation of valuable property rights belonging to plaintiff. There is no constitutional authority for sustaining the gold laws which have practically destroyed a legitimate industry.

Defendant moved to dismiss plaintiff's complaint upon the following grounds:

> I.
>
> "Plaintiff's complaint states that the taking of her property and the acts constituting the alleged wrong committed by the defendant, occurred more than six years prior to the filing of this action, and this action is therefore barred by the statute of limitations.
>
> II.
>
> Plaintiff's complaint fails to state a claim or cause of action upon which relief can be granted.
>
> III.
>
> Plaintiff's complaint fails to allege facts sufficient to establish jurisdiction of this Court over defendant, United States of America." (Tr. 10-11)

The District Court dismissed plaintiff's complaint, whereupon this appeal was timely perfected.

SPECIFICATION OF ERROR NO. 1

The District Court erred in dismissing plaintiff's complaint.

Summary of Argument

1. The District Court had jurisdiction of this cause and the Court of Appeals has jurisdiction of this appeal.

Title 28, Section 1346, U.S.C.A.

Title 28, Section 1291, U.S.C.A.

Jacobs v. U. S., 290 U.S. 13, 54 S. Ct. 26, 78 L. Ed. 142 (1933).

U. S. v. Great Falls Mfg. Co., 112 U.S. 645, 5 S. Ct. 306, 28 L. Ed. 846 (1884).

2. Plaintiff's claim is not barred by the statute of limitations.

Title 28, Section 2401, U.S.C.A.

Oro Fino Consolidated Mines v. U. S., 118 Ct. Cl. 18 (1950).

3. Where private property is taken by the United States in the exercise of its power of eminent domain, but without condemnation proceedings, the owner may, under the Tucker Act, bring suit for just compensation in a District Court sitting as a Court of Claims.

Title 28, Section 1346, U.S.C.A.

Jacobs v. U. S., 290 U.S. 13, 54 S. Ct. 26, 78 L. Ed. 142 (1933).

U. S. v. Great Falls Mfg. Co., 112 U.S. 645, 5 S. Ct. 306, 28 L. Ed. 846 (1884).

4. When the government forbids an owner of property to make any other use of it, and requires him to

sell it to the government it is taking of private property for public use.

Edward P. Stahel & Co. v. U. S., 111 Ct. Cl. 682, 78 F. Supp. 800, Cert. den. 336 U.S. 951 (1948).

5. Price fixing and monopoly of gold by the United States is unconstitutional in that it is a taking of private property without due process of law. The Treasury Department can pay $35 per oz. for gold if it so desires, but it has no authority to make that price mandatory to the property owner by and through its gold regulations.

Fifth Amendment to the Constitution of the United States.

6. The depreciation of the property of the owner rather than an accretion of a right or interest to the sovereign constitutes the taking, therefore, the fact that the Government doesn't get the gold laying in the ground of plaintiff's property is immaterial.

U. S. v. General Motors Corporation, 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311 (1945).

7. Plaintiff's property "within the meaning of the Fifth Amendment" is not limited to the physical thing; that is, the mine. Plaintiff's right, as owner, to produce gold from her mine at a profit is in intself "property" protected by the Constitution.

Fifth Amendment to the Constitution of the United States.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

Homestake Mining Co. v. U. S., Ct. Cl. Case No. 50, 195, p. 121 (1954).

8. The power given to Congress "to coin money and regulate the value thereof" does not give either the Executive or the Legislative branch of the Government authority to confiscate personal property at a price set by the Executive branch of the Government.

Article I, Section 8, Constitution of the United States.
Articles I, II, and III, Sections 1, Constitution of the United States.
Fifth Amendment to the Counstitution of the United States.

9. When a taking of private property has been ordered under the power of eminent domain, the question of just compensation is *judicial* and neither Congress nor the Executive has the power to fix a mandatory price on gold of the property owner.

Article III, Section 1, Constitution of the United States.
Monongahela Nav. Co. v. U. S., 148 U.S. 312, 13 S. Ct. 622, 37 L. Ed. 463 (1893).

10. All legislative powers are vested in the Congress of the United States and the Executive Department has no Constitutional authority to legislate; therefore, price fixing and monopoly of gold by executive order is unconstitutional in that it is attempted legislation by the executive.

Articles I and II, Sections 1, Constitution of the United States.
Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).
Little v. Barreme, 2 L. Ed. 243, 2 Cranch 170 (1804).

11. The liberty of a lawful industry to survive in the

United States and to compete for a price from the various users of its product is protected by the Constitution and when the industry is discriminated against and strangled into extinction by a fixed mandatory 1934 price together with the consequences of subsequent inflation, it constitutes "seizure" and the destruction of liberty in violation of the Constitution.

Fifth Amendment to the Constitution of the United States.
Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).
Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

12. Gold is not a deleterious substance like opium and is not subject to regulation under the police power.

Constitution of the United States.
Austin v. Tennessee, 179 U.S. 343, 21 S. Ct. 132, 45 L. Ed. 224 (1900).

13. The "Trading with the Enemy Act" was only applicable to property which may get into the hands of the enemy during time of war. It was not intended to apply to property belonging to United States Citizens with no enemy involved.

Title 12, Section 95A, U.S.C.A.
Propper v. Clark, 337 U.S. 472, 69 S. Ct. 1333, 93 L. Ed. 1480 (1949).

14. Executive Order 6260, issued pursuant to claimed authority under the "Trading with the Enemy Act", only applied to gold in existence when the order went into effect. It was not intended to apply to gold subsequently mined.

Title 12, Section 95A, U.S.C.A.

15. Allowing plaintiff to go to the market place and get the best price she can for her gold will not affect the par value of $35 set under the International Monetary Fund.

Bretton Woods Agreement Act, 59 Stat. 512.

Argument

JURISDICTION

It is generally believed that the United States Goverfnment cannot be sued on the broad principle that the sovereign may not be sued without its consent. However, in the First Amendment to the Constitution, (which is the first article of our Bill of Rights), it is provided that the people shall have the right "to petition the Government for redress of grievances." In the first fifty years of the Government's existence this right of petition resulted in so many claims being presented to Congress for all kinds of grievances that the wheels of legislation were clogged. After years of discussion in Congress it was decided in 1855 to set up a tribunal of 3 judges to hear these claims and make reports to Congress. It was soon found, however, that the limited powers of this first court of claims did not remedy the trouble and the Court's recommendations to Congress soon piled up as badly as claims had done previously. Finally during the Civil War (1863) at President Lincoln's suggestion, the powers and jurisdiction of the Court were enlarged so that it might render decisions upon claims. Further, the Court was increased from 3 to 5 judges. Provision for the general jurisdiction for the Court of

Claims is found under Title 28, Section 1491, U.S.C.A., and we will set the provisions out for the reason that they are identical with those of the Tucker Act. Section 1491 provides:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:
>
> (1) Founded upon the Constitution; or
>
> (2) Founded upon any Act of Congress; or
>
> (3) Founded upon any regulation of an executive department; or
>
> (4) Founded upon any express or implied contract with the United States; or
>
> (5) For liquidated or unliquidated damages in cases not sounding in tort."

Historically we know that from the 1860's on, there was great migration of people westward and the impetus had been stepped up because of the discovery of gold in California. Indeed, history shows that the gold fields in California were responsible to a large extent in winning the civil war for the North. Therefore, in exercising Constitutional rights to petition the Government for redress of grievances, it became more and more difficult for segments of our population to take advantage of the Court of Claims in Washington. This was so because of difficult travel conditions over great distances. Therefore, in 1887 Congress, by and through the Tucker Act, made all United States District Courts limited Courts of Claims, thereby allowing a large portion of the claims to be settled locally. Citizens could petition their Government for redress of grievances up to $10,000.00 without going to Washington. The Act upon which juris-

diction for the case at bar is based, is found in Title 28, Section 1346, U.S.C.A. It provides as follows:

> "The District Courts shall have original jurisdiction, *concurrent with the Court of Claims,* of:
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, *founded either upon the Constitution,* or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

Mrs. Laycock chose not to go to Washington to seek full redress for her grievances, but rather to waive all damages over $10,000.00 and have her case decided by the District Court of the United States sitting as a local Court of Claims.

Claims "founded upon the Constitution" are generally claims for recovery of just compensation under the Fifth Amendment. When private property is taken, as is the contention in the case at bar, a claim under this heading is appropriate. (*Jacobs v. U. S.,* 290 U.S. 13 (1933); *U. S. v. Great Falls Mfg. Co.,* 112 U.S. 645 (1884)). In *Stovall v. U. S.,* 26 Ct. Cl. 226, 240 (1891), the court in discussing the jurisdiction conferred by the phrase "claims upon the Constitution" stated that it "is as comprehensive and untrammelled a grant of jurisdictional authority as the legislative power could well make * * * that whenever a citizen is entitled to compensation by virtue of the express terms of the Constitution, he may recover it by a suit against the Government". In the case at bar, the Fifth Amendment is directly involved. Plaintiff is being deprived of lawful use

of her property without due process of law and without just compensation. Further, gold is invariably found with silver at a ratio of approximately 9 to 1. Silver is not regulated but, nevertheless, plaintiff is effectively and unconstitutionally deprived of the silver contained in her gold as a result of the gold regulations.

With respect to the second and third jurisdictional provisions of the Tucker Act, namely, Acts of Congress and regulations of executive departments, it is plaintiff's theory that the litigation challenges the acts and regulations involved as being contrary to established law and hence invalid. Therefore, she is entitled to recover in this action.

It is her theory with respect to the last jurisdictional provision that the laws and regulations constitute a taking of her property by the Government and, therefore, she is entitled to compensation under the Fifth Amendment by implied contract. See *United States v. North American Transportation & Trading Company,* 253 U.S. 330, 333 (1920), wherein it was stated that:

> "When the government, without instituting condemnation proceedings, appropriates for a public use, under legislative authority, private property to which it asserts no title, *it impliedly promises to pay therefor.*"

Also see *United States v. Great Falls Mfg. Co.,* 112 U.S. 645 (1884); and *United States v. Lynah,* 188 U.S. 445 (1903), as direct authority for jurisdiction in the case at bar.

From what has been already said, it is apparent that Section 773 (b) of Title 31 U.S.C. cited by the Govern-

ment in its Memorandum, which withdraws consent to sue the United States in certain instances, is not applicable for the reason that the Constitution is controlling and specifically gives the right to petition Government for redress of grievances. Among the grievances redressable is the taking of private property for public use—compensation for which is guaranteed by the 5th Amendment. The enabling legislation for carrying these constitutional provisions into effect is the Tucker Act. Further, wholly apart from the Tucker Act, the Constitutional provision that private property cannot be taken without just compensation, carries with it a waiver on the part of the government of its immunity to suit except by its consent.

LIMITATIONS

Surely the Government cannot be serious in presenting this ground for dismissal. Its success would mean that all unconstitutional acts of the legislative or executive branches of Government could not be challenged by parties aggrieved thereby after the six year limitation period had passed. No authority has been cited, and, indeed, there is none to cite for this proposition. The plaintiff is continuously being deprived of the use of her property by unconstitutional laws and regulations placed in effect by her Government. She has elected to waive all of her claims antedating 2 years last past. The wrongs of the Government are continuous and being continuous she has the Constitutional right to challenge a portion thereof and waive the balance. The same contention now being made by the Government was made

and rejected in *Oro Fino Consolidated Mines v. U. S.*, 118 Ct. Cl. 18 (1950). It was a case arising out of the L-208 gold mine closing order during the second world war. The Government argued that according to the petition the alleged taking occurred not later than January 18, 1943, and the plaintiff's claim first accrued on that date, which was more than six years before the petition was filed. The defendant further contended that even if the taking be regarded as a series of successive takings ending with revocation of L-208 in June, 1945, rather than a single act, the statute would still bar recovery of any damages accruing before February, 1944. This ground of the demurrer was specifically overruled, the court holding that the statute did not commence to run until the consequences of the taking "having so manifested themselves that a final account may be struck." The damage to the plaintiff in the case at bar is continuous in nature every hour of every day and, therefore, no final account may yet be struck. Therefore, this action is brought well within the time provided under Title 28, Section 2401, U.S.C.A.

CONSTITUTIONALITY

Preliminary Statement

Plaintiff is 65% owner of a gold mine in Grant County, Oregon. In years past considerable developmental work had been done to the point where approximately 243,000 yards of gold bearing ore is presently "blocked out"; that is, exposed underground on three sides. Hers is a "lode" mine which means that the gold

is deposited in auriferous quartz veins in hard rock. A lode mine is distinguished from a "placer" mine in that the latter has its gold in streamborne materials. To recover the gold from plaintiff's mine, it is necessary to process the ore by smelting and otherwise treating it by various processes.

The Treasury Department's gold regulations promulgated July 14, 1954, requires that an owner be licensed to "melt or treat", "acquire", "hold", "transport", or "earmark" gold. They further provide that the gold must then be sold to the United States or its duly authorized agent at a fixed price of $35 per fine ounce. For penalties to the owners for failure to comply with the gold regulations—the following consequences are ennumerated therein: (1) "Any gold * * * shall be forfeited to the United States"; (2) "any person * * * shall be subject to a penalty equal to twice the value of the gold"; and (3) "whoever wilfully violates any of the provisions of this subdivision or of any license, order, rule, or regulation issued thereunder, shall upon conviction, be fined not more than $10,000 or * * * may be imprisoned for not more than ten years, or both."

It is plaintiff's contention in this suit that the foregoing regulations deprive her of property without due process of law in violation of the Federal Constitution. She is suffering a daily loss for the reason that the depreciated currency manifested in high wages and other costs make her mine unprofitable to operate. As a further result, the resale value thereof is all but destroyed. The Court can take judicial knowledge of the decline of

the purchasing power of the paper dollar. The United States Government has directly admitted the consequences of this fact of economic life which has had the effect of closing down over 90% of the operating gold mines in the United States. In the Report of the Director of the Mint for 1952, at page 27 is the following report from New Mexico.

> *"The high cost of labor and material compared with the fixed price of gold since World War II has almost eliminated straight gold and gold-silver mining as a material factor in the metal mining industry of New Mexico."*

and, on page 23 is the discouraging report from Colorado:

> *"The rise in wages and cost of materials, with no change in the domestic price of gold accentuated the depression in straight gold mining."*

It is apparent the depression is universal when we glance at the report from California found on page 22:

> *"Adversely affected by the unchanged price of gold and the inflationary trend of the national economy, California gold yield in 1951 fell 18% below the 1950 output."*

Alaska is most severly hit for the reason that for many years gold has been the main production commodity supporting its economy. Following is the report found at page 20:

> A 17% decrease in production marked a return to the general trend downward which has characterized the industry since the initial postwar upsurge that culminated in 1947 * * * higher than ever costs of supplies and equipment, scarcity of equipment and difficulty of obtaining replacement parts and

> prohibitive competitive wage rates offered by contractors connected with defense projects in areas adjacent to mines, *coupled with an unchanged established U. S. Treasury price of $35 per fine ounce,* posed an almost unsurmountable barrier to continued operation of many of the mines."

Plaintiff's is a so-called marginal mine for the reason that it would cost her 35 of the presently depreciated paper dollars to mine and process her gold ore. On the other hand, if she were allowed a fair price in terms of today's depreciated currency, she would be a wealthy woman. As a result, she sincerely contends that she is being deprived of her property without due process of law in violation of the Constitution every day of the year.

Gold Laws are Unconstitutional

The basic law being dealt with in the case at bar is the Fifth Amendment to the Constitution of the United States and is worded as follows:

> *"No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."*

It is plaintiff's primary theory that her property is in effect being taken under the power of eminent domain. The general rule is that:

> "Where property is taken by the United States in the exercise of the power of eminent domain, but without condemnation proceedings, the owner may, under the Tucker Act, bring suit for just compensation in the Court of Claims or in a District Court sitting as a Court of Claims."

Jacobs v. United States, 290 U.S. 13, 54 S. Ct. 26, 78 L. Ed. 142 (1933).

United States v. Great Falls Mfg. Co., 112 U.S. 645, 5 S. Ct. 306, 28 L. Ed. 846 (1884).

As a secondary quarrel with the activities of the Government with respect to gold, it is her contention that the executive department has no constitutional power to fix a price for her product. The general rule is that when a taking of private property has been ordered, *the question of just compensation is judicial.* (*Monongahela Navigation Co. v. United States,* 148 U.S. 312, 327, 13 S. Ct. 622, 37 L. Ed. 463 (1893)).

The foregoing case is directly in point, but before discussing it at some length, we call the Court's attention to the following facts: In the complaint we are talking about gold as a commodity (private property) and not as money. Gold does not became money until it has been mined, processed, bullionized,—(all at great expense to the owner); then purchased by the Government, minted, coined and stamped with its seal. But, under the Gold Regulations the Government, under penalty of fine and/or imprisonment, unlawfully compels plaintiff to accept a fixed price for her product and then undertakes to supply the requirement of the arts and industrial users of gold at the same price—$35 an ounce. Under our system of government, the right to sell to users of gold in itself is a property right which *gold producers and not the Government* are entitled to exercise.

In the *Monongahela* case Congress had passed an act for condemning what was known as "the upper lock and

dam of the Monongahela Navigation Company", and provided "that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls should not be considered or estimated." The court held that this proviso was beyond the power of Congress; that it could not appropriate the property of the navigation company without paying its full value, and that a part of that value consisted in the franchise to take tolls. In the foregoing case Congress attempted to manipulate, or tried to affect the price to be paid for private property taken for public use and the Court held that this could not be done; rather, the determination of what constitutes just compensation is a judicial question. The legislature, therefore, may not by statute exclude what may be an essential element in making the just compensation provided for by the Constitution. In the case at bar the Government, by way of executive regulations—as distinguished from congressional act—tells the plaintiff that she must have a license to reduce her gold to usable form and that she must then sell to the Government, under severe penalties, at a price set by Government in its depreciated paper currency. This constitutes a flagrant violation of property rights protected by the Constitution. Plaintiff is not quarreling with the power of Government to assert its right of eminent domain. It being an incident of sovereignity, the right of eminent domain requires no constitutional recognition, but when the taking occurs, as has been done in this case, plaintiff is entitled to just compensation. Because of the importance of the Monongahela case, we ask the court's indulgence in quoting extensively

from it. Its reasoning and enunciation of law controlling the case at bar cannot be successfully challenged today. At page 324 of the U.S. report:

> "The question presented is not whether the United States has the power to condemn and appropriate this property of the Monongahela Company, for that is conceded, but how much it must pay as compensation therefor. Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; *for in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.* The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights.
>
> "In the case of *Sinnickson v. Johnson,* 17 N.J.L. 129, 145, cited in the case of *Pumpelly v. Green Bay & M. Canal Co.,* 80 U.S. 13 Wall. 166, 178, it was said that 'this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.' * * * And in this there is a natural equity which commends it to every one. It in nowise detracts from the power of the public to take what-

ever may be necessary for its uses; while, on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

"But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, in this 5th Amendment, there is stated the exact limitation on the power of the government to take private property for public uses. And with respect to constitutional provisions of this nature it was well said by Mr. Justice Bradley, speaking for the court, in *Boyd v. United States,* 116 U.S. 616, 635: 'Illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure. *This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.* A close and literal construction deprives them of half their efficacy, and leads to gradual depreciations of the rights, as if it consisted more in sound than substance. *It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.*' * * *

"By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. *But this is a judicial, and not a legislative question.* The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; *but when the taking has been ordered, then the question of compensation is judicial.* It does not rest with the public taking the property, through Congress or the legislature, its repre-

sentative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry * * *

"In the last of these cases * * * will be found these observations of the court: *'The right of the legislature of the state, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case to determine what is the "just compensation" it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent or to extinguish any part of such "compensation" by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution.* If anything can be clear and undeniable upon principles of natural justice or constitutional law, it seems that this must be so.' * * * We are not, therefore, concluded by the declaration in the Act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property."

The foregoing case speaks for itself and is directly in point.

The fact that in the case at bar the Government has not already received the gold deposited by nature on plaintiff's property in Grant County is immaterial on the issue as to whether or not there has been a "taking", within the meaning of the due process clause of the Fifth Amendment. In determining whether there was a compensable taking, it is immaterial that the government did not itself operate the mine or effect a physical entry. The plaintiff's property "within the meaning of

the Fifth Amendment" is not limited to the physical thing; that is, the mine. Plaintiff's right, as owner, to produce gold from her mine is in itself "property" protected by the Constitution. The direct question was involved and decided by the case of *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). The case involved the construction of a statute of the Commonwealth of Pennsylvania prohibiting the mining of anthracite coal under inhabited surface structures. In the chain of title the Coal Company had reserved the right to mine. If it mined, the surface structures would collaspe, whereupon the legislature passed the law in question. Mr. Justice Holmes, at page 415 of the U. S. Report had the following to say about the subject:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation—when this seemingly absolute protection is found to be qualified by the police power, the actual tendency of human nature is to extend the qualification more and more until at last private property disappears; but that cannot be accomplished in this way under the Constitution of the United States. The general rule is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking * * * in general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders * * * we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the damage.
>
> As we have said, this is a question of degree—and, therefore, cannot be disposed of by general

> propositions, but we regard this as going beyond any of the cases decided by this Court."

The statute in question was held to be an unconstitutional taking of property without due process of law and the Coal Company prevailed.

The foregoing case is of utmost importance because it demonstrates that the right to produce coal was a compensable property right owned by the Coal Company. Likewise, plaintiff's right to produce gold is a compensable property right. What Mr. Justice Holmes said about the right to mine coal in Pennsylvania is equally true of the right to mine gold in Grant County, Oregon.

> "As said in a Pennsylvania case, 'For practical purposes, *the right to coal consists in the right to mine it.' Commonwealth v. Clearview Coal Co.*, 256 Pa. St. 328, 331. *What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."* (260 U.S. 393, 414)

The Government's policy of forcing a price in terms of inconvertible and depreciated paper currency, which price is unrealistic when compared to the high cost of labor and materials in the present day, effectively appropriates and destroys plaintiff's right to mine gold. What makes the right to mine gold valuable is that it can be exercised at a profit and when it cannot be exercised at a profit, her constitutional property rights are destroyed. She is not alone in her predicament for the United States will readily admit that the gold mining industry has

been all but eliminated from the American scene. This is a tragedy because of all industries, gold mining is alone in being non-competitive. When allowed to operate it creates new wealth to flow in our economic veins and that wealth has no competition. Any quantity of gold is readily accepted by all peoples and all nations.

It is immaterial that when the Government continuously deprives the plaintiff of her property—the right to mine gold—the Government does not itself exercise that right. To be a violation of the due process clause, it is sufficient that the plaintiff was deprived of property rights. It is also immaterial that there is not a physical invasion of her property. In *U. S. v. General Motors Corporation,* 323 U.S. 373, 378 (1945), the Court made the following observation:

> "In its primary meaning, the term "taken" would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. *The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquistion of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."*

To the same effect, see *U. S. v. Welch,* 217 U.S. 333 (1910); *Richards v. Washington Terminal Company,* 233 U.S. 546 (1914); *U. S. v. Dickinson,* 331 U.S. 745 (1947); and *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949).

Plaintiff is being deprived of her property daily in two different respects. First, she is prevented from making a profit because of the low, arbitrary and mandatory price fixed by the Treasury Gold Regulations; secondly, because of this very fact nobody else can make a profit and, therefore, for re-sale purposes the property is comparatively worthless. So, she has a potentially valuable property which is lying dormant, tunnels caving in and generally deteriorating, all because the Treasury Department misconstrued its authority by arbitrarily fixing a mandatory price on gold of $35.00 per fine ounce.

This taking is justified by the Government on the ground that Congress has authority "to coin money and regulate the value thereof" and, therefore, it can legally set a price on newly mined gold because *prior to 1934 some gold was coined into money.* We wonder what Anaconda Copper Company would say if its copper price was arbitrarily fixed at 10¢ a pound because of copper being used in pennies? Likewise, what would the reaction be if a silver price was fixed because of silver coins being made of the product? The same analogy could be drawn for nickel and even paper. Would the paper companies hold still if the Government would monopolize and fix an arbitrary price on all paper merely because paper is primarily used as money today? This analogy could even be somewhat ridiculously but logically extended to ink because ink is used in printing paper currency. The statutory provision for the purchase of metal for minor coinage (silver, nickel, and copper) is found in 55 Stat. 255, 31 U.S.C.A. Sec. 340:

> "* * * The superintendents, with the approval of the Director of the Mint as to price, terms and quantity *shall purchase the metal required for such coinage by public advertisement, and the lowest and best bid shall be accepted,* the fineness of the metals to be determined on the mint assay * * *"

That sounds to us like the American and Constitutional way for the United States to gain possession and ownership of metals (private property) from its citizens! A fortiori, *when gold isn't even being coined into money* the government should not be allowed to confiscate it at a price set by its own executive department. Gold isn't coined into money today, yet the government points to Article I, Section 8, of the Constitution to justify its monopoly of gold. *It isn't constitutional and it isn't fair!* Gold mine property owners are not receiving "Justice under Law."

Further, plaintiff is being deprived of property without due process of law in the following respect: Gold is invariably found with silver at a ratio of approximately 9 to 1. Gold must be licensed. Silver is not licensed. She is, therefore, prevented from processing her silver because of it's being tied with the gold. Therefore, she is prevented from making use of her silver without due process of law.

Another and more recent decision which controls the case at bar is *Edward P. Stahel & Co. v. U. S.,* 111 Ct. Cl. 682, 78 F. Supp. 800, Cert. den. 336 U.S. 951 (1948). In that case the Government had issued an order on October 16, 1941, requiring every owner of raw silk to sell it to the Defense Supplies Corporation, a Govern-

ment agency, and or to any person who was fulfilling parachute manufacturing contracts with the Government. A supplemental order required that every owner of raw silk report to the Office of Production Management the amount of raw silk that he had on hand. The Court reached the jugular vein when it used the following language in 78 F. Supp. at page 804:

> "We think that, by its order of October 16, the Government took the plaintiffs' silk for public use. It required the plaintiffs to sell their silk upon request, to those who would use it for the Government's purposes, or to the Government itself, and it forbade the delivery or use of the silk for any other purpose except by the specific license of the Government * * * *to say that when the Government forbids an owner of property to make any other use of it, and requires him to sell it, upon request, to the Government, or its designee who will use it for a Government purpose, is not a taking of the property for public use, would be to make the constitutional right contingent upon the form by which the Government chose to acquire the use of the property.*"

In the case at bar plaintiff is challenging the Government's constitutional right to force condemnation and requisition of her property at other than a reasonable price for her product measured in present day currency. If the Supreme Court holds that requisitioned silk must be paid for with a reasonable price when it is used for public purposes, we can see no distinction between it and gold fresh out of the ground at high cost of production.

In the case of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153

(1952), President Truman by executive order, directed the seizure of steel plants to avert a shutdown by strike thereof during the Korean War. It was the Persident's belief that the emergency caused by our soldiers dying on the battlefields justified his action and that he had authority to issue the order by accumulation of executive powers under the Constitution. The District Court granted plaintiff's motions for temporary injunctions against the executive department from enforcing the order and the Supreme Court affirmed the lower court. It was held that the seizure order was not within the constitutional power of the President and he had no Congressional authority to issue it. At p. 867 of the S. Ct. report, the court speaking through Mr. Justice Black stated that:

> "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand."

At p. 880 of the S. Ct. report, Mr. Justice Frankfurter made the following observation:

> "We do not know today what powers over labor or property would be claimed to flow from Government possession if we should legalize it, what rights to compensation would be claimed or recognized, or on what contingency it would end. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to

pass away, but it is the duty of the Court to be last, not first, to give them up."

Mr. Justice Douglas' concurring opinion at p. 887 reads in part as follows:

> "The legislative nature of the action taken by the President seems to me to be clear. When the United States takes over an industrial plant to settle a labor controversy, it is condemning property. The seizure of the plant is a taking in the constitutional sense. United States v. Pewee Coal Co., 341 U.S. 114, 71 S. Ct. 670, 95 L. Ed. 809. A permanent taking would amount to the nationalization of the industry. A temporary taking falls short of that goal. But though the seizure is only for a week or a month, the condemnation is complete and the United States must pay compensation for the temporary possession. United States v. General Motors Corp., 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311; United States v. Pewee Coal Co., supra.
>
> "The power of the Federal Government to condemn property is well established. Kohl v. United States, 91 U.S. 367, 23 L. Ed. 449. It can condemn for any public purpose; and I have no doubt but that condemnation of a plant, factory, or industry in order to promote industrial peace would be constitutional. But there is a duty to pay for all property taken by the Government. The command of the Fifth Amendment is that 'no private property be taken for public use, without just compensation.' That constitutional requirement has an important bearing on the present case."

Likewise in the case at bar, there is no constitutional or congressional authority any place to be found in the books whereby the executive department has the right to set a mandatory price for gold mined by a private property owner. If the steel companies can get their

property back from the executive department, why can't Mrs. Laycock "get her property back" so that she can make use of it at a profit?

In the Youngstown case Mr. Justice Clark at p. 882 of the Supreme Court report discusses the interesting early case of *Little v. Barreme,* 2 L. Ed. 243, 2 Cranch 170 (1804). In that case Congress had given special authority to the President to seize vessels bound or sailing *to* a French port. The President issued an order to seize the "Flying Fish" a vessel bound *from* a French port. It was held by a unanimous court speaking through Chief Justice John Marshall that the President's instructions had been issued without authority and that they could not "legalize an act which without those instructions would have been plain trespass."

In the case at bar, the Government cites the Trading With the Enemy Act as authority for the gold regulations, which in turn confiscates plaintiff's property. The Trading With the Enemy Act was designed to prevent gold, among other properties, from reaching and benefiting the *enemy during time of war.* Propper v. Clark, 337 U.S. 472, 93 L. Ed. 1480, 69 S. Ct. 1333 (1949). Further there is nothing in the act giving authority to fix a price for gold and particularly a price which makes it unprofitable to mine gold in the United States. The plaintiff is not an "enemy," and there would be nothing detrimental to the United States Government in allowing her as a citizen to make profitable use of her own property. The Barreme case is in point.

During the last war there was issued the Gold Mine Closing Order, October 8, 1942, known as L-208. The order had political implications. On December 19, 1941, Milo Perkins, acting under Vice-President Henry A. Wallace, Chairman of the Board of Economic Warfare, wrote a secret letter to Donald M. Nelson of the War Production Board, wherein he stated:

> *"A program of gradual reduction and final cessation of all new gold production spread over a period of fifteen to twenty years is the only satisfactory solution to the general gold problem.* This is the moment to institute such a program." (*Homestake Mining Co., v. U. S.,* Ct. Cl. No. 50,195, see Commissioner Day's Findings, p. 84).

As a result of the Gold Closing Order several cases are pending in the United States Court of Claims for damages under the Fifth Amendment to the Constitution. On March 30, 1954, Commissioner Day in Case No. 50,195, *Homestake Mining Company v. U. S.,* at page 121 made the following Findings:

> "64. By reason of the issuance of Order L-208 Homstake was deprived of the use and benefit of ownership of its gold-mining properties, to wit, *the right to obtain gold from the ore bodies on its properties and to sell such gold.*
>
> 65. No compensation has been paid to plaintiff Homestake by defendant for the closing of its mine as hereinbefore described."

We can see no distinction between a direct order shutting down gold mines and a license having the same effect with a price set by Government in terms of depreciated paper currency which, in effect, economically strangles the mine into extinction. The foregoing Find-

ings are presented as direct authority for our position in the case at bar.

Gold is not an evil product. It serves humanity in many useful respects. For example, it is used widely in the dental profession, jewelry trade and the electrical industry. For many years the United States has not mined enough gold to take care of our commercial needs. The picture is partially reflected in the Report of the Director of the Mint, 1953:

> *"GOLD RECEIPTS:*
>
> 4,345,579 fine oz. $ 152,095,264
> of which
> 1,470,942 fine oz. 51,482,982
> were from newly mined domestic production.
>
> *WITHDRAWALS:*
>
> 29,592,874 fine oz. $1,035,750,578
> including
> 2,079,904 fine oz. 72,792,630
> issued for domestic, industrial, professions, or artistic purposes. Other withdrawals were principally in connection with the United States settlement of international balances."

The total gold holdings of the Bureau of the Mint Institutions at the beginning of the fiscal year of 1953 were $23,346,409,526.73, and at the close of the fiscal year $22,462,754,212.65—a net decrease in holdings during the year of $883,655,314.08. This diminution in our gold supply is directly caused by the arbitrary fixed price which makes gold mining unprofitable.

Neither gold mining nor its product is an evil and, therefore, the production and sale of gold are not subject to the same general rules which apply to the pro-

duction and sale of narcotics, intoxicating liquors, cigarettes and so forth. Consequently, the defendant is not in a position to deny the plaintiff compensation on the ground that this case is like *Mugler v. Kansas,* 123 U.S. 623 (1887), which involved a state statute prohibiting the manufacture of intoxicating liquors, or *Hamilton v. Kentucky Distilleries Co.,* 251 U.S. 146 (1919), the War-Time Prohibition Act or cases such as *Austin v. Tennessee,* 179 U.S. 343 (1900), the sale of narcotics.

The foregoing cases, and cases to be presently cited, exclude the applicability of the foregoing rule. Likewise, the case at bar is not governed by the rule of law that compensation is not allowable where the injuries are merely consequential in that they result from the exercise of lawful power. The unrealistic and fixed price for gold operates directly against plaintiff's property and and by its regulations *the Government demands the gold. In case she refuses to give her gold to the Government at 35 depreciated dollars she has the alternatives of (1) going to jail and/or paying a fine; or (2) leaving it in the ground.*

A brief reference to cases in which the Supreme Court held that a taking has occurred as against "consequential" injury points up the justice inherent in plaintiff's claim. In *United States v. Dickinson,* 331 U.S. 745 (1947), the Supreme Court held that property is "taken" within the meaning of the Constitution "when inroads are made upon the owner's use of it to an extent that, as between private parties, a servitude has been acquired either by an agreement or in the course of

time." In *United States v. Causby,* 328 U.S. 256 (1946), it was held that where the noise and glaring lights of planes landing at or leaving an airport leased to the United States, flying below the navigable air space as defined by Congress, interfere with the normal use of a neighboring farm as a chicken farm, there is such a taking as to give the owner a constitutional right to compensation.

That the Government had imposed a servitude on land adjoining its fort so as to constitute a taking within the law of eminent domain may be found from the facts that it had repeatedly fired the guns of the fort across the land and had established a fire control service there. (*Portsmouth Harbor Land & Hotel Co. v. United States,* 260 U.S. 327 (1922), *Cf. Portsmouth Harbor Land & Hotel Co. v. United States,* 250 U.S. 1 (1919); *Peabody v. United States,* 231 U.S. 530 (1913). A corporation chartered by Congress to construct a tunnel and operate railway trains therein was held liable for damages in the suit by an individual whose property was so injured by smoke and gas forced from the tunnel as to amount to a taking of private property. (*Richards v. Washington Terminal Co.,* 233 U.S. 546 (1914).

In *United States v. Lynah,* 188 U.S. 445, plaintiff's rice planation was reduced to a valueless bog as a result of an improvement in navigation undertaken by the government. Action was commenced in the United States District Court for the District of South Carolina to recover $10,000 as compensation. The government claim-

ed that the damage, if any, was done in improving the navigability of a navigable river; that it is given by the Constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors or others, it is an injury which is purely consequential, and for which the government is not liable. At page 471 of the U. S. Report is the following language:

> "But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the 5th Amendment of paying just compensation. * * * Therefore, following the settled law of this court, we hold that there has been a taking of the lands for public uses, and that the government is under an implied contract to make just compensation therefore."

Blackstone, in his Commentaries, at page 129 recognizes three absolute rights possessed by all individuals in a free society: (1) The right of personal security; (2) the right of personal liberty; and (3) the right of private property. The individual's absolute right to property consists in the "free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." (Blackstone Commentaries, p. 138). The common law of England, which Blackstone discussed, was the law of the original thirteen colonies at the time of our revolution. It was, therefore, natural that before the United States Constitution was ratified by the several states there be a provision preventing the federal government from taking private

property without full indemnity to the owner. Thus we find the background and reason for the Fifth Amendment.

Just compensation means the full and perfect equivalent, in money, of the property taken. (*Monongahela Nav. Co. v. United States,* 148 U.S. 312, 326 (1893). The owner's loss, not the taker's gain is the measure of such compensation. (*United States ex rel. v. T. V. A. v. Powelson,* 319 U.S. 266, 281 (1943); *United States v. Miller,* 317 U.S. 369, 375 (1943); *Boston Chamber of merce v. Boston,* 217 U.S. 189, 195 (1910). Where the property has a determinable market value, that is the normal measure of recovery. (*United States ex rel. T. V. A. v. Powelson,* 319 U.S. 266, 275 (1943); *United States v. New River Collieries Co.,* 262 U.S. 341 (1923). Market value is "what a willing buyer would pay in cash to a willing seller". (*United States v. Miller,* 317 U.S. 369, 374 (1943).

Plaintiff is not willing to sell her gold to the Government for 35 of its paper dollars. 35 depreciated paper dollars does not constitute "the full and perfect equivalent in money of the property taken". If the market were allowed free play, an ounce of fine gold would in all probability settle down to around $100.00. If that's what the market says a fair price for gold is, then under the Constitution, she is entitled to it.

The discrimination of the existing regulations must be self-evident. The Government says to the domestic gold producer, you must either sell your goods to the Government or close shop or go to jail. In effect that

says to the producers, you must work for the Government. You must operate in a competitive labor market. You must pay Government-levied taxes and pay Government-fixed social-security benefits. Your product, however, must be sold to the government and only to the Government at a price which the Government determines. This is wrong. Further, if it is a denial of due process of law to forbid negro students the liberty to attend public schools of their choice, (*Bolling v. Sharpe,* 347 U.S. 497 (1954), why isn't it a denial of due process to deprive gold mine owners the liberty to attend the market place of their choice and compete for a price for their product on equal terms as do other industries in this free country? Of all legitimate industries in America, why should the United States single out the gold industry for this separate treatment? Why should the gold industry, and not the copper, nickel, or silver industries, be selectively treated as to a mandatory price? Copper, nickel and silver are coined into money in the present day—gold isn't. Yet, the gold industry is destroyed because it can't keep up with paper inflation when the price of gold is fixed at the 1934 level. This is outright discrimination and is wrong. Further, it is contrary to our concept of freedom and in violation of constitutional law! Now is the time, we submit, for this court to make clear that this is not what our Constitution stands for.

Preliminary Statement to Gold Clause Decisions

Under Article I, Section 8 of the Federal Constitution, Congress is given the power to "coin money and regulate the value thereof." Congress cannot coin money

out of gold and regulate its value until it has acquired possession of the gold by purchase. But, by assuming that gold just exists without production costs and by ignoring the Constitution, Congress in the early 30's attempted to give the executive branch of the Government absolute power over all gold irrespective of its form, location, or ownership. Gold coins and gold certificates were called in and irredeemable paper currency substituted. Contracts demanding payment in gold were repudiated and held to be against public policy. Citizens were effectively deprived of the right to own gold. (Communist countries and the United States are companions in this prohibition.) Moreover, the President went further and assumed power to control all gold produced in this country by imposing license requirements and otherwise regulating the production, processing and possession of gold. The market price for gold at the time was $34.45 per fine ounce and the Treasury Department rounded this figure off to $35.00 and made the price mandatory for all new gold. Previously the Treasury price had been $20.67 *but producers were free to enter any market they chose for disposal of their product.*

Powers not specifically delegated by the Constitution to the three branches of Government are reserved to the sovereign people. (Tenth Amendment, Constitution of the United States.) It is the plaintiff's theory in the case at bar that under the Constitution, Congress was not given the power to arbitrarily create circumstances which prevent her from making use of her property or to regulate and/or confiscate privately owned gold in the

ground or in its transition to usable form. Further, the carte' blanche' attempt to delegate a legislative function to the executive was in itself a violation of the Constitution. Indeed, under the provision of the Constitution covering the coinage of money, the President and Secretary of the Treasury had no more right to confiscate and regulate the ownership of gold mined in the future than *they had to confiscate and regulate the ownership of future silver, nickel, copper or paper—also monetary elements*. The Constitutional provision under which they purported to act confers power only with respect to *money and the value thereof*. It cannot be expanded to embrace gold in the ground or gold in its transition to commodity form *before* it gets into the lawful possession of the Government.

It is, therefore, plaintiff's contention that legislation and executive orders (1) depriving her of the right to possess gold in its transition from the ground to usable form; (2) requiring her to be licensed to process the ore bodies in extracting gold therefrom; (3) creating a vice-like monopoly of her gold in the Federal Government once the extraction process commences; (4) requiring her to sell her gold only to the Government and to accept 35 of that government's inconvertible and depreciated paper dollars per fine ounce therefor; and (5) subjecting her to a maximum penalty of 10 years in prison or $10,000.00 fine, or both, for failure to comply, are unconstitutional and void.

The Gold Clause Decisions

In the case at bar the laws and regulations under direct attack are the Trading with the Enemy Act of 1917, as amended in 1933 and Executive Order 6260 promulgated thereunder (Title 12, U.S.C.A., Sec. 95a); the section of the Gold Reserve Act of 1934 giving the Secretary of the Treasury power to regulate gold (Title 31, U.S.C.A., Sec. 442); and the Treasury gold regulations promulgated thereunder on July 14, 1954.

The Gold Clause Decisions, on the other hand, deal with none of the foreging provisions, but rather are concerned with (1) the constitutionality of the Thomas Amendment to the Agricultural Adjustment Act authorizing the President to reduce the content of the gold dollar; (2) that part of the Gold Reserve Act of January 30, 1934, withdrawing all gold coin from circulation (31 U.S.C.A., Sec. 315b); (3) the Presidential directive of January 31, 1934, in which the gold "dollar" was reduced in gold content (Proc. No. 2072, 48 State. 1730, expired June 30, 1943—Note 31 U.S.C.A., Sec. 821); and (4) the Joint Resolution of June 5, 1933 (48 Stat. 113, 31 U.S.C.A., Sec. 436) making incovertible paper currency legal tender for all debts, public and private. None of the foregoing provisions of the law is being challenged in the case at bar and the Gold Clause cases do not control in any respect its ultimate decision. However, because of almost universal first impression to the contrary, we will briefly discuss the cases herein.

It is well settled law that the power conferred on Congress by the Constitution cannot be delegated to

another department. (*Panama Refining Co. v. Ryan,* 293 U.S. 388; *Schechter Corp. v. United States,* 294 U.S. 495). Yet, the legislative department authorized the President, by senate amendment to the House Agricultural Adjustment Bill, to reduce the content of the gold dollar but not below 50%. The purpose of the original Act was explained in its preamble as follows: (48 Stat. 31)

> "To relieve the existing national economic emergency *by increasing agricultural purchasing power* * * *"

The senator who incorporated the amendment to the House Bill (i.e. the so-called Thomas Amendment) explained its purpose as follows:

> *"The amendment has for its purpose the bringing down or cheapening of the dollar, that being necessary in order to raise agricultural and commodity prices* * * * The first part of the amendment has to do with conditions precedent to action being taken later.
>
> It will be my task to show that if the amendment shall prevail it has possibilities as follows: It may transfer from one class to another class in these United States value to the extent of almost $200,000,000,000. This volume will be transferred, first from those who own the bank deposits. Secondly, this value will be transferred from those who own bonds and fixed investments." (Congressional Record, April, 1933, pp. 2004, 2216-7, 2219.)

Few people realize or understand that the reduction in the gold content of our imaginary gold "dollar" which in turn formed the basis for the $35 price for gold had its origin in the foregoing legislation. *Its purpose was not*

to shackle future mine owners with a $35 price, but rather to raise farm prices during the depression. But, when the executive order came along on January 31, 1934, cutting the "gold dollar" a different purpose was set forth therein: (48 Stat. 1730)

> "WHEREAS, I find, upon investigation, that the foreign commerce of the United States is adversely affected by reason of the depreciation in the value of the currencies of other governments in relation to the present standard value of gold, and that an economic emergency requires an expansion of credit; and
>
> WHEREAS, I find, from an investigation, *that in order to stabilize domestic prices and to protect the foreign commerce against the adverse effect of depreciated foreign currencies,* it is necessary to fix the weight of the gold dollar at 15-5/21 grains.
>
> NOW, THEREFORE, etc * * *"

Still there is obviously no intent to impose upon gold miners a mandatory price for their product of $35.00 per fine ounce. *In fact, nowhere does there appear in any legislation, authority for the Treasury Department to fix a mandatory price on gold of $35.00 per fine ounce* or any other price! And, nowhere can there be found any legislation as authority for imposing a fixed price upon gold miners for their newly mined product.

Origin of the $35.00 Price

From 1834 to 1934 the Treasury had purchased gold at the rate of $20.67 per fine troy ounce, *but that price was never forced upon anyone.* It was not embodied in any law and owners of gold could take it or leave it. Indeed, at the time of the proclamation of January 31,

1934, the market price for gold was $34.45 per fine troy ounce. So, when the $35 price was decided upon by the President, gold was increased by 55¢ over the market price. Devaluation was accomplished by establishing the weight of the gold dollar at 15-5/21 grains, nine-tenth fine. This reduced its gold content by 40.94 percent, making the new "dollar" 59.06 percent of the gold content of the old. As a result, an ounce of fine gold (480 grains) could be coined into 35 dollars compared with 20.67 dollars before the devaluation. The weight of the gold dollar was thus changed from 23.22 to 13.714 grains of pure gold, or from 25.8 to 15-5/21 grains of standard gold 0.900 fine. Note, however, that it is not precise language to talk about the "gold dollar" after *January 30, 1934,* because it had been destroyed and eliminated by the enactment of the Gold Reserve Act on that date. (Title 31 U.S.C.A., Sec. 315b, 48 Stat. 340). It seems impossible to be able to cut the "gold dollar" on January 31, 1934—the date of the presidential proclamation,—when it was no longer in existence. Be that as it may, the act further provided that the Treasurer may make gold regulations (See 31 U.S.C.A., Sec. 442). But even in the gold regulations it is not clear that the $35.00 price is mandatory for newly mined gold. It is only after he has applied for a license that the miner is "hooked" into the price. This is so because if he just keeps his gold, he goes to jail, and if he relinquishes it to the government, it pays one price only—35 paper dollars.

In 1936 the Agricultural Adjustment Act was held unconstitutional for taking money from one class for

the benefit of another (*U. S. v. Wm. M. Butler, et al., Receivers of Hoosac Mills Corp.,* 297 U.S. 1), but in the meantime, on January 31, 1934, the President had acted on the Senate Amendment and cut the gold dollar. (Proc. No. 2072, 48 Stat. 1730, expired by its own volition June 30, 1943, see note 31 U.S.C.A., Sec. 821).

Among the powers conferred on Congress by the Constitution is "to coin money, regulate the value thereof, and of foreign coin". (Article I, Section 8, Clause 5). By this provision authority over money was given to Congress alone. Neither in Article I creating the legislative department, nor in Article II, establishing the executive department, is there any intimation that the President should have anything to do with regulating the value of money. The power was withheld from him. By being withheld—that is, not granted, it was prohibited. Therefore, it was for Congress to determine whether the content of the dollar was to be changed, and, if so, to change it. Nevertheless, the president was allowed by Congress to perform its task of fixing the value of the dollar, so on January 31, 1934, the President "directed that the standard gold dollar be reduced from 25.8 grains to 15-5/21 grains".

The Joint Resolution of June 5, 1933, (48 Stat. 113; 31 U.S.C.A., Sec. 463) declared that provisions requiring "payment in gold or a particulalr kind of coin or currency" were "against public policy", and provided that "every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein", shall be discharged "upon payment, dollar for dollar,

in any coin or currency which at the time of payment is legal tender for public and private debts".

Suits by a holder of Government bonds, a holder of a government gold certificate and a holder of a railroad bond reached the Supreme Court, were argued together, and decided by several opinions which were generally called the Gold Clause Decisions.

The positions and the contentions of the various parties are interesting, but more interesting are the contentions and questions which were not raised or presented.

No party challenged the authority of the Government to seize all gold coin, bullion and certificates. No party challenged the authority of Congress or of the President to debase the gold dollar which Congress had fixed at 25.8 grains of gold and declared to be the standard unit of value. One opinion said that such matters had not been considered by the Court because they had not been presented. (294 U.S., p. 370).

The parties contended that the Joint Resolution declaring all coins and currencies legal tender dollar for dollar was unconstitutional, in that it deprived them of property without due process of law and without just compensation.

Each party *assumed* that the dollar of 25.8 grains of gold had been debased. *Implicit in that assumption was the assumption that Congress had power to debase it.*

Each party sought to recover paper currency equal to the amount of gold promised by his contract, measured by a gold dollar of 25.8 grains. But the debtors tendered only paper currency for equal number of dollars, which under the statute was equivalent to 15-5/21 grains of gold for each dollar face amount of currency. Assuming that the value of such currency was 15-5/21 grains for each dollar face amount of such currency, the paper currency tendered evidenced approximately 40 per cent less gold than the amount promised by the obligation.

The holder of the railroad bond had sued upon a coupon which promised $22.50 in gold coin of a standard of 25.8 grains to the dollar and asked judgment for $38.10 face amount in the new paper currency. (*Norman v. B. & O. R. Co.,* 294 U.S. 240).

The holder of a gold certificate of the Treasury of the United States for $106,300.00 each of 25.8 grains asked judgment for $170,634.07 in the new paper currency. (*Nortz v. United States,* 294 U.S. 317).

The holder of a government bond which had promised payment of $10,000.00 in gold of the standard of 25.8 grains to the dollar asked judgment for $16,931.25 in the new paper currency. (*Perry v. United States,* 294 U.S. 330).

Thus, each party claimed that the promise was an obligation to pay in gold coin based upon a dollar of 25.8 grains, and each party sought the face amount of paper currency which he alleged to be the equivalent of gold promised.

Thus, by the very statement of his claim, each party had implicity admitted: (a) That the government had power to debase the dollar or unit of value, and that the government had done so, and (b) that the government had power to make inconvertible currency legal tender not only for private debts, but even for the obligations of the government itself, such as gold certificates or government bonds.

In the Perry case the court held in a 5 to 4 decision, that the Fourth Liberty Bonds of the United States, which promised to pay the buyer (the lender of money to the Government) "in United States gold coin of the present (1918) standard of value", *could not be repudiated as to the form of payment.* The bonds having been issued under the clause of Section 8 of Article I of the Constitution authorizing Congress "to borrow money on the credit of the United States", and being affected by the provision of the Fourteenth Amendment that "the validity of the Public Debt of the United States authorized by law * * * shall not be questioned", those quoted expressions stating the sovereign will of the people, it was not within the power of Congress, a servant of the people with inferior authority "to override their will thus declared". The court stated its conclusion that:

> "The joint resolution of June 5, 1933, insofar as it attempted to override the obligation created by the bond in suit, *went beyond the congressional power*". (*Perry v. United States,* 294 U.S. 330, 354).

This holding meant that the laws were unconstitutional and were wiped off the books as to government

bonds and that's the law today. But, the bond holder won a hollow victory. He got a favorable judicial declaration that he should be paid in gold but that he wasn't damaged because gold had been seized and withdrawn from circulation. Further, there was no damage for the reason that "plaintiff has not shown, or attempted to show, that in relation to buying power he has sustained any loss whatever." (294 U.S. 330, 357).

In the other two decisions the gold clauses involved were held to be invalid as obstructing the power of Congress to regulate the value of money.

The opinions are limited to the effect of gold clauses in contracts and the legal tender required to discharge the obligation. The cases do not stand as authority for declaring that the plaintiff in the case at bar has no cause of action. The President's directive cutting the gold content of the dollar is not here involved. Neither is the Joint Resolution of June 5, 1933, making all coins and currencies legal tender dollar for dollar. Further, the Gold Reserve Act of 1934 is not involved in the same respect in which it was involved in the Gold Clause Decisions. Here, the Act is attacked because it is a claimed source of authority for the treasury regulations requiring gold to be processed during its productive phase only under Treasury licenses and that thereafter it must be sold *only* to the Government for 35 depreciated and irredeemable paper dollars. The plaintiff would not necessarily quarrel with the Treasury paying $35.00, *provided that it didn't have a monopoly as to gold,—forcing owners to sell to the Government at its price or go to prison.*

If she were allowed to enter the market place and compete for a reasonable price for her product as do owners of other commodities, she would be a wealthy woman today. But, because of the economic straight-jacket imposed upon her by the gold regulations, she may be characterized as "property poor".

Legal Tender Decisions

Before leaving the Gold Clause Decisions, we deem it necessary to point out obvious errors perpetuated therein. We feel free to do so not only because of the practical aspect of the problem, but because of an early statement made by Mr. Justice Taney in 7 Howard at page 470:

> "I * * * am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether in the force of the reasoning by which it is supported."

In the second Legal Tender decision the following erroneous statements were made:

> "By the Act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted and about six per cent was taken from the weight of each dollar * * * The effect of this was that all creditors were subjected to a corresponding loss.
>
> The creditor who had a thousand dollars due him on the 31st day of July, 1934 (the day before the Act took effect) was entitled to a thousand dollars of coined gold of the weight and fineness of the existing coinage. The day after he was entitled only to a sum 6 per cent less in weight and

in market value, or to a smaller number of silver dollars.

No one ever doubted that a debt of one thousand dollars contracted before 1834, could be paid by one hundred Eagles coined after that year, though they contained no more gold than ninety-four Eagles such as were coined when the contract was made, and this not because of the intrinsic value of the coin, but because of its legal value." (12 Wallace, pp. 551-552.)

The fact is that Congress in 1834 *did not debase the monetary unit*. A glance at the first Coinage Act (1792) shows that we were on a silver standard at that time, the dollar being measured by 371.25 grains of pure silver. The gold dollar did not even come into existence until 1849 (9 Stat. 397) and we didn't change to the gold standard until 1873 (17 Stat. 426). When the Act of June 28, 1834 was passed it was profitable to ship gold coins in existence at that time, namely, the Eagle, Half Eagle and Quarter Eagle, out of the country. What Congress actually did was to remove enough grains from those coins to bring their bullion value in line with the measuring device of silver. Nobody was subjected to a loss and conversely nobody received a gain. What Congress was doing was exercising its lawful function of regulating the value of money, using its national standard of value as the measuring stick. The error of fact made by the Court in the second Legal Tender decision has lived to plague the courts to the present day. In the Norman case (294 U.S. at page 305) the Supreme Court perpetuated the error in the following language:

"The Court referred to the Act of June 28, 1834, by which a new regulation of the weight and value

> of gold coin was adopted, and about six per cent was taken from the weight of each dollar. The effect of the measure was that all creditors were subjected to a corresponding loss, as the debts then due 'became solvable with six per cent less gold than was required to pay them before.' But it had never been imagined that there was a taking of private property without compensation or without due process of law. The harshness of such legislation, or the hardship it may cause, afforded no reason for considering it to be unconstitutional."

The foregoing statements seem incredible in light of the true fact. They are all the more incredible when it becomes known that it was Justice Charles Evans Hughes himself who considered the Legal Tender Decisions "one of the three self-inflicted wounds which the Court had brought upon itself." (Supreme Court of the United States by Charles Evans Hughes.)

The case at bar is not a legal tender case. Plaintiff it not quarreling with the proposition of accepting inconvertible paper "dollars" for her product. She is perfectly willing to give the Government an exclusive contract for her entire output of gold. What she does claim is that she is entitled to enough of the inconvertible and depreciated paper dollars to equal full and fair compensation for her product. This is required under the due process clause and is necessary in order that she may pay today's higher wages and costs and still make a profit. Therefore, the Gold Clause Decisions are not controlling, although as we construe the Perry case, the reduction in the gold content of the imaginary gold dollar was and is unconstitutional. But even if construed

otherwise, plaintiff's case is not controlled by the decisions. Neither is it controlled by the so-called Legal Tender Decisions which formed the background authority for the practical result of the Gold Clause Decisions.

In the Nortz case, 294 U.S. at page 328 is found the following language:

> "Plaintiff explicity states his concurrence in the Gavernment's contention that the Congress has complete authority to regulate the currency system of the country. He does not deny that, in exercising that authority, the Congress had power 'to appropriate unto the Government outstanding gold bullion, gold coin and gold certificates.' Nor does he deny that Congress had authority 'to compel all residents of this country to deliver unto the Government all gold bullion, gold coins and gold certificates in their possession.' These powers could not be successfully challenged. *Knox v. Lee,* 12 Wall. 457; *Juilliard v. Greenman,* 110 U.S. 421; *Ling Su Fan v. United States,* 218 U.S. 302; *Norman v. Baltimore & Ohio R. Co.,* decided this day, ante, p. 240."

Since the powers were not challenged, it would seem to us that the foregoing statement of the court is pure dicta and, therefore, not controlling upon any future court decisions. Since the plaintiff had not questioned the power of the Government to compel residents to deliver unto the Government all gold coin, gold bullion and gold certificates in their possession, the court obviously could not decide that question. Therefore, at best the foregoing observation is dictum and without any force as a decision. The Court said:

> "These powers could not be successfully challenged." (Citing cases)

The fact is that no one of the decisions cited support the statement as made and in no one of those cases was any such question presented. *Knox v. Lee* and *Juilliard v. Greenman* did not present that question and neither of those opinions attempted to decide it. *Ling Su Fan* did not involve gold coins or the law of the United States and was no authority for the statement. *Norman v. B. & O. R. Co.* presented no such question and the opinion did not attempt to decide it.

The following statement was made in the *Norman* opinion in 294 U.S. at page 304:

> "Moreover, by virtue of this national power, there attaches to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. *Ling Su Fan v. United States*, 218, U.S. 302, 310. Those limitations arise from the fact that the law 'gives to such coinage a value which does not attach as a mere consequence of intrinsic value.' Their quality as legal tender is attributed by the law, aside from their bullion value."

The statement was repeated in the opinion on Government bonds at page 356. The statement is erroneous in several respects. The Court in its opinion was talking about gold coins and that their ownership is subject to the limitations which public policy may require because of their quality as legal tender and as a medium of exchange.

When the opinion was rendered, the statement meant nothing because gold coins had been abolished by the Gold Reserve Act on January 30, 1934. After that date gold coin could not legally exist in the United States

and, therefore, had no quality as legal tender or as a medium of exchange. The statement continued and said that the law gives to gold coinage a value which does not attach as a mere consequence of intrinsic value and that the quality of gold coins as legal tender is attributed by the law "aside from their bullion value". The meaning of that statement is that the law of the United States gave to gold coins a value different from their intrinsic or bullion value and its clear implication is that the law of the United States gave to gold coins a value in legal tender in excess of their intrinsic or bullion value. Neither the statement nor the implication is correct because they are both contrary to fact.

Every Legal Tender Act of the United States has limited the quality of gold coins as legal tender to their actual bullion or intrinsic value. The Coinage Act of 1772 (1 Stat. 250), the Act of 1834 (4 Stat. 700), the Act of 1873 (17 Stat. 420) and the Legal Tender Act of June 5, 1933, which was quoted by the court as a footnote to its opinion (294 U.S. 292), the latter being currently in the law books at 31 U.S.C.A., Sec. 462 (48 Stat. 113).

In an earlier opinion, the Supreme Court had stated the reason for thus limiting the legal tender capacity of gold coins. It had said that all men accept the fact that value was inherent in gold and that because the gold dollar was certified by the Government to be a certain weight and purity, it had been declared to be legal tender in payment of debts. (*Bronson v. Rodes,* 7 Wallace 229). In face of the statutes and its former opinions, the

Court in 1935 erroneously stated that the law gives to gold coins a quality as legal tender apart from their bullion value. *If the law could do that, then there would be no reason for regulating the value of coined money.* Congress could give us a small gold coin of quality as legal tender for thousands of dollars and thus make a gold coin legal tender without any regard for its bullion value or its intrinsic value. In justifying its statement, the Court cites *Ling Su Fan v. U. S.,* 218 U.S. 302, 310, and lifts some language out of the context. The language as it appears in the Ling Su Fan opinion is as follows:

> "Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are due to the fact that public law (of the Philippine Islands) gives to such (silver) coinage a value which does not attach as a mere consequence of intrinsic value. The quality as a legal tender is an attribute of law aside from their bullion value."

However, when the facts are examined, it becomes apparent that the citation had no place in the Gold Clause Decisions. By rephrasing some of the language in the opinion, the Court took a statement out of its context and gave to it a meaning entirely different from its meaning in the original context. The statement made in the Ling Su Fan opinion did not relate to gold coins and did not relate to law of the United States. It related only to the subsidiary silver coins of the Philippine Islands and to the law of the Philippine Islands. Beyond that, the statement as made in the Philippine Island case gave to the subsidiary silver coins a value as legal

tender *less* than their bullion value. In the Gold Clause opinions of 1935, the court applied that statement to the law of the United States, which gave to paper currency a value as legal tender *greater* than its gold equivalent. The situation becomes more ridiculous when the facts in the Ling Su Fan opinion are fully stated. A gold peso containing 12.9 grains of gold was the unit of value in the Islands. The Islands also used a silver peso containing 416 grains of standard silver. The proportion of the metals were wrong so that the bullion value of the silver peso in Hong Kong was about 9% greater than its face value and for that reason the silver coins of the Islands were being exported for profit. In order to keep the silver coins as a medium of exchange, the Islands made it a criminal offense to export them. Ling Su Fan was convicted of exporting Philippine Island silver coins. On his appeal to the Supreme Court of the United States he contended that the law of the Islands prohibiting the export of such silver coins deprived him of his property in such coins without due process of law. The Court held that if the local coinage was demanded by the general interest of the Islands, legislation to keep such coinage in the Islands as a medium of exchange was not a violation of a private right.

After stating the claim that the law of the Philippine Islands deprived the owner of his property without due process of law by prohibiting the exportation of silver coins, the opinion made the statement which has been previously quoted herein. Under the facts presented in the Philippine Islands' case the statement was correct

and true as applied to the silver peso of the Islands under Philippine law. The statement meant that one who acquired Philippine coins in the Philippine Islands held them subject to the law of the Islands, which prohibited their exportation because they were legal tender and the medium of exchange. It also meant that the law of the Philippine Islands gave to such silver coins a value of legal tender less than their bullion value, but in 1935, the majority of the Supreme Court in the Gold Clause Decisions took the statement out of its context and applied it to gold coins and to the law of the United States.

Other indisputable facts magnify the error. The Philippine peso of 12.9 grains of gold was also called a dollar. Since the Islands belonged to the United States, the Philippine peso, which was only half the weight of our dollar might be considered a coin of the United States and for that reason might be considered legal tender under the phrase "dollar for dollar". Both the Senate and the House quickly recognized that *legal tender should coincide with actual value*. The Senate Committee Report said:

> "In making all coins and currencies of the United States legal tender the Thomas Amendment has created confusion, which was not intended, in the provisions of preexisting law relating to gold coins when below standard weight, subsidiary coins and minor coins. Philippine coins may also have been made legal tender for payment of debts in the continental United States, contrary to the real intent. These uncertainties should be removed." (Senate Report No. 7, 73rd Cong., First Session.)

The House Committee Report said:

> "The second section of the Resolution is a clarification of a clause in the Act approved May 12, 1933. Under that Act as passed, coins of the Philippines would be legal tender in the United States and abrased gold coins would be legal tender at their face value. This situation, which occurred through inadvertence, should be corrected as is done by the Resolution." (House of Representatives Report No. 169, 73rd Cong., First Session.)

Congress further recognized the intrinsic value of the gold dollar when by the Act of June 19, 1934, more than $23,000,000 was appropriated out of the Treasury to make good the gold equivalent of the loss sustained by the Philippine government on its deposits in this country as a result of the debasement of our dollar.

Bretton Woods Agreement

In July, 1944, there was held in Bretton Woods, New Hampshire, a United Nations Monetary and Financial Conference. At this meeting there were representatives of forty-four nations. Agreement was reached on the establishment of an International Monetary Fund and an International Bank for Reconstruction and Development. The Fund proposed to promote exchange stability between member nations. The conference was divided into three Technical Commissions. Commission I was entitled "International Monetary Fund", its Chairman being Harry Dexter White of the United States. Commission II was entitled "Bank for Reconstruction and Development" with Lord Maynard Keynes of the United Kingdom as its Chairman.

We quote the following portions of the final Agreement regarding the International Monetary Fund:

"Article IV

Par Value of Currencies

Section 1. Expression of par values—

(a) The par value of the currency of each member shall be expressed in terms of gold as a common denomination or in terms of the United States dollar of the weight and fineness in effect on July 1, 1944.

(b) All computations relating to currencies of members for the purpose of applying the provisions of this Agreement shall be on the basis of their par values.

Section 2. Gold purchases based on par values—

The Fund shall prescribe a margin above and below par value for transactions in gold by members, and no member shall buy gold at a price above par value plus the prescribed margin, or sell gold at a price below par value minus the prescribed margin."

The Agreement was accepted by Congress July 31, 1945, by and through the Bretton Woods Agreement Act, 59 Statutes 512.

At the time that the Agreement was made we had no gold dollar in the United States. However, if we had a gold dollar it would contain 15-5/21 grains of gold 9/10ths fine. An ounce of gold would therefore be coined into $35.00. But since we have no gold dollar, we substitute in our thinking paper currency. Under the Bretton Woods Agreement gold has to be bought and sold by the member governments at the rate of $35.00

per ounce, *but the Agreement does not say that gold must be purchased from property owners at that rate.* If the plaintiff-appellant is successful in her appeal to this Court, the decision would have no effect one way or the other upon the Bretton Woods Agreement. Member nations could still stabilize their currencies with gold at the par value of $35.00 per ounce. They could buy and sell gold between themselves at $35.00 per ounce, the Treasury could still offer to buy gold from private citizens at $35.00 per ounce, but the plaintiff would be able to exercise her constitutional right as a citizen in a free country to sell her gold to the jewelry trade, electrical industry and/or the dental profession for the best price available. This is a right that she is entitled to exercise under the Constitution and there is no national or international law in existence today which could be construed to fetter that right.

Possession Cases as Direct Authority

Previously herein we stated that there is no enabling legislation which gives the Treasury Department authority to fix a mandatory $35.00 price on gold in any form. The pertinent part of the Gold Reserve Act involved is found at *31 U.S.C.A., Sec. 442.* It provides that:

> "The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and (c) for such other pur-

> poses as in his judgment are not inconsistent with the purposes of * * *. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in places beyond the limits of the continental United States."

Note that the language uses the terms "regulations" and "conditions" but not "licenses"; that there is no declaration that gold is against public policy and, further, there is no authority for arbitrary pricing of newly mined gold, or for that matter gold in any form.

The Trading with the Enemy Act of March 9, 1933 (48 Stat. 1) provides in part as follows:

> "During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—
>
> (A) investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit or payments between, by, through or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities,"

Likewise, there is no authority contained therein giving the Secretary of the Treasury and/or the President power to set a fixed and mandatory price for newly mined gold. Neither is there any declaration therein that gold is against the public policy of the United States.

Executive Order 6260, Section 4, provides:

> "No person other than a federal reserve bank after the date of this order, shall acquire in the United States any gold coin, gold bullion or gold certificates, except under license therefor issued pursuant to this Executive Order * * *"

In the balance of Section 4 the President "authorizes" the Secretary of the Treasury to issue licenses as to gold coin and gold bullion. Section 5 provides that:

> "After 30 days from the date of this order no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this order."

The balance of the section "authorizes" the Secretary of the Treasury to issue licenses with respect to gold coin, gold bullion and gold certificates.

We question the legal right of the President to authorize licensing by the Treasury when the authority was not given in the enabling legislation. Further, subsequent approval by Congress of the Presidential Act, to our mind, cannot make something out of nothing. If there was no authority in the first place, then the attempted Executive legislation is ineffective. Therefore, it would seem that in order to achieve valid legislation, Congress would have to re-enact the Executive legislation. Be that as it may, Section 5 of the Executive Order quoted above has on two occasions been held unconstitutional on the very basic ground of plaintiff's suit. The first case is *U. S. v. Driscoll,* District Court, Mass.

(1935), 9 F. Supp. 454, wherein defendant was indicted for failure to comply with Executive order 6260. In the second count of the indictment defendant is charged with owning or in possession of gold coin after 30 days from the date of the order in violation of the provisions of Section 5. This count was held to be uncontitutional and demurrable since the Executive could not by power of requisition take private property for public use without just compensation. The United States Attorney argued that:

> "There is no controversy but that Congress gave the President the right to prohibit the hoarding of gold. If requisition is necessarily incidental to prohibiting, then the right to make requisition comes necessarily within the right to prohibit."

In answer to this argument, the Court made the following statement:

> "If we accept as sound the argument of the United States Attorney, it does not follow that the power of requisition could be exerted by the executive branch in disregard of the inhibitions of the Fifth Amendment against taking property for public uses without just compensation. (*West v. Lyders,* 36 Fed. 2d 108, 110)
>
> To prevent the further requisition of gold or to provide for its exchange as was done in the earlier executive order of April 6, 1933, (revoked by order of August 28th) might be held to be a proper exercise of the power, *but to condemn as criminal all who failed to yield up valuable property rights, lawfully acquired, without providing for just compensation, is not only requisition, but unlawful requisition. Obviously the right to prohibit the hoarding of gold would not extend to confiscation of private property, assuming, as we all may, that*

such property is affected with a public interest. The demurrer to the second count is sustained."

In the second case, *Campbell v. Chase National Bank of New York,* District Court of N. Y. (1933), 5 Fed. Supp. 156, is the following significant language:

> "Turning now to the regulation made under Section 5 of the Executive Order of August 28, 1933, prohibiting every person, after 30 days from the date of the order, from holding in his possession or retaining any interest, legal or equitable, in any gold bullion situated in the United States, *I think it is clear that the persons who drafted that executive order for the President's signature went outside the congressional mandate of Section 2 of Title I of the Act of March 9, 1933,* which gave the President authority to investigate, regulate or prohibit—under such rules and regulations as he might prescribe by means of licenses or otherwise—inter alia the hoarding of gold bullion. It seems to me that authority to regulate or prohibit an act such as hoarding or the continuous use thereof cannot be considered to authorize the requirement of Section 5 of the executive order that the owner of gold must yield up his interest therein and title thereto.
>
> It seems to me quite clear, therefore, that Section 5 of the executive order of August 28, 1933, *is in effect confiscatory and an unconstitutional method of enforcing the powers of Congress . . ."*
>
> Affirmed on other grounds, 71 Fed. 2d 669.

We concur in the analysis of the two courts above and conclude that the Secretary of the Treasury is on infirm ground when he cites Order 6260 as authority for placing a mandatory and fixed price upon newly mined gold, which, during the process of production arrives at a point where it can be called gold bullion.

Heretofore we discussed the background of legislation which gave rise to the $35.00 price and pointed out that its original purpose was to raise farm prices. Thereafter its stated purpose was to expand credit and to protect foreign commerce against depreciated foreign currencies. It would appear that the real immediate reason was to drive all *existing*—(not future)—gold coin, bullion and certificates into the treasury. At no place in any of the legislation and/or its background is there even an intimation that future mined gold was to be fixed at a static, arbitrary and compulsory price to the mine owner. Further, in the Monongahela case, the United States Supreme Court held that fixing the price of private property taken for a public use *is a judicial and not a legislative function*. Therefore, when Congress attempted to specify that tolls could not be considered in setting a price to the owner, the Supreme Court held the legislation unconstitutional. A fortiori the arbitrary and mandatory fixed price set by the Secretary of the Treasury without any enabling legislation by Congress is unconstitutional. This is especially so when the consequences for failure to turn over the private property to Government is imprisonment and/or fine.

When the "gold dollar" was changed from 25.8 to 15-5/21 grains of gold nine-tenths fine, there was no gold dollar in existence because it had been destroyed by the Gold Reserve Act of the previous day. Therefore, when the President made his proclamation, he wasn't regulating the value of money because there was no gold money in existence at that time. Further, the Congres-

sional power to coin money and regulate the value thereof can't be used as authority for the Gold Regulations because Fort Knox gold is not being used by the Government as a monetary reserve. The Treasury is in the business of buying and selling gold at $35.00 an ounce and its stock of merchandise is the gold it holds at Fort Knox. We make reference to the following statement Mr. W. Randolph Burgess, Deputy to the Secretary of the Treasury, made at the hearings before the Subcommittee of the Committee on Banking and Currency, United States Senate, March 29, 1954:

> "We *buy* and *sell* gold freely with other countries through their central banks and treasuries at the price of $35.00 an ounce * * *" (p. 17)

And at page 24:

> "We have *sold* $1½ billion worth of gold to foreign countries in the last 18 months."

If the Treasury is buying and selling gold to the point where its stock of merchandise has been depleted almost one billion dollars in the period of one year, it is not holding the gold as a monetary reserve. This inventory depletion is not being compensated by replacement because gold miners are out of business because of low price. Therefore, it is easy to calculate the time when the Treasury will be out of the gold business because it will have run out of merchandise to "sell". Title to Fort Knox gold is rather vague, but we believe it safe to assume that the American people have some property interest in it. If that be so, the United States, by and through the Treasury Department, is a trustee to the extent of that property interest. If that be so, there is a

breach of trust when our Government sells one and a half billion dollars' worth of gold to foreign countries in 18 months at the bargain basement price of 35 depreciated paper dollars per ounce. A private trustee would not be allowed to deplete the corpus of his trust in that manner.

CONCLUSION

Simple and elementary justice, together with Constitutional mandate, require that the plaintiff's cause of action be recognized under the law in the case at bar. The compulsory requisition of newly mined gold to the Government at its own arbitrary price under threat of severe penalties is a taking of private property without due process of law. Plaintiff's complaint properly stated a cause of action based upon that taking. Judgment herein dismissing her complaint should therefore be reversed.

Respectfully submitted,

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APPENDIX A

U. S. TREASURY DEPARTMENT

OFFICE OF THE SECRETARY

GOLD REGULATIONS

[Reprinted from FEDERAL REGISTER, July 14, 1954]

JULY 14, 1954

UNITED STATES
GOVERNMENT PRINTING OFFICE
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SUBPART A—GENERAL PROVISIONS

SUBPART B—CONDITIONS UNDER WHICH GOLD MAY BE ACQUIRED AND HELD, TRANSPORTED, MELTED OR TREATED, IMPORTED, EXPORTED, OR EARMARKED

SUBPART C—GOLD FOR INDUSTRIAL, PROFESSIONAL, AND ARTISTIC USE

SUBPART D—GOLD FOR THE PURPOSE OF SETTLING INTERNATIONAL BALANCES, AND FOR OTHER PURPOSES

SUBPART E—GOLD FOR OTHER PURPOSES NOT INCONSISTENT WITH THE PURPOSES OF THE GOLD RESERVE ACT OF 1934 AND THE ACT OF OCTOBER 6, 1917, AS AMENDED

SUBPART F—PURCHASE OF GOLD BY MIN

SUBPART G—SALE OF GOLD BY MINTS

SUBPART H—TRANSITORY PROVISIONS

AUTHORITY: §§ 54.1 to 54.70 issued u sec. 5 (b), 40 Stat. 415, as amended, 3, 8, 9, 11, 48 Stat. 340, 341, 342; 12 U. 95a, 31 U. S. C. 442, 733, 734, 822b, E 6260, Aug. 28, 1933; E. O. 6359, Oct. 25, 1 E. O. 9193, as amended, 7 F. R. 5205; 3 1943 Cum. Supp.; E. O. 10289, 16 F. R. 9 3 CFR 1951 Supp.

SUBPART A—GENERAL PROVISIONS

§ 54.1 *Authority for regulations.* virtue of and pursuant to:

(a) The authority vested in the S retary of the Treasury by the Gold serve Act of 1934, approved January 1934 (48 Stat. 337; 31 U. S. C. 440), the authority with respect to the proval of regulations issued thereun which the President of the United St has delegated to the Secretary of Treasury in paragraph 2 (d) of Exe tive Order No. 10289 of September 1951 (16 F. R. 9501) and

(b) The authority which the Pr dent of the United States has delega to the Secretary of the Treasury by ecutive Orders Nos. 6260 of August 1933 (31 CFR 1938 ed. Part 50), 6 of October 25, 1933 and 9193 of Jul 1942, as amended (7 F. R. 5205, 3 C 1943 Cum. Supp.), which delegati were made by the President of United States by virtue of and p suant to the authority vested in by section 5 (b) of the act of Octo 6, 1917 (40 Stat. 415), as amended

)n 2 of the act of March 9, 1933
tat. 1), and title III, section 301 of
'First War Powers Act, 1941" (55
839; 12 U. S. C. 95a), and all other
)rity vested in him, the following
ations, entitled "Gold Regulations,"
ed in the public interest and neces-
and proper to carry out the pur-
of said acts and Executive orders,
ssued by the Secretary of the Treas-

4.2 *General provisions*—(a) *Scope.*
)ns 54.12 to 54.34 refer particularly
:tion 3 of the Gold Reserve Act of
as amended, and to Executive Order
260 of August 28, 1933, sections 4,
d 6 of the Executive Order No. 6359
tober 25, 1933, and Executive Order
193 of July 6, 1942, as amended; and
35 to 54.52 refer particularly to sec-
8 and 9 of the Gold Reserve Act of
as amended.

Delivery requirements of 1933 gold
s. Executive Order 6102 of April 5,
Executive Order 6260 of August 28,
(31 CFR 1938 ed. Part 50), and the
of the Secretary of the Treasury
:cember 28, 1933, as amended and
emented, required that, with cer-
xceptions, all persons subject to the
liction of the United States deliver
e United States gold coins, gold
n and gold certificates situated in
nited States and held or owned by
persons on the dates of such orders.
coins having a recognized special
to collectors of rare and unusual
including all gold coins made prior
)ril 5, 1933, have been exempted
such delivery requirement. The
ations in this part do not alter or
in any way the requirements un-
aid orders to deliver gold bullion
old certificates and gold bullion and
:ertificates required to be delivered
ant to such orders are still required
delivered and may be received in
dance with the Instructions of the
tary of the Treasury of January 17,
(§ 53.1 of this chapter), subject to
ghts reserved in such instructions.

Effect of authorizations and li-
s. (1) A general authorization
ined in, or a license issued pursuant
regulations in this part, permitting
icquisition, holding, transporting,
ig or treating, importing, exporting
marking of gold, constitutes within
mits and subject to the terms and
tions thereof a license issued under
pursuant to Executive Order No.
)f August 28, 1933, for such acquisi-
holding, transporting, etc.

(2) Any authorization in the regulations in this part, or in any license issued hereunder to acquire, hold, transport, melt or treat, import or export gold in any form shall not be deemed to authorize, unless it specifically so provides, the acquisition, holding, transporting, melting or treating, importing, or exporting of the following:

(i) Any gold coin (except rare gold coin as defined in § 54.20) or any gold melted by any person from gold coin subsequent to April 5, 1933.

(ii) Any gold which has been held at any time in noncompliance with the acts, the orders, or any regulations, rulings, instructions or licenses issued thereunder, including the regulations in this part, or in noncompliance with section 3 of the act of March 9, 1933, or any orders, regulations, rulings, or instructions issued thereunder.

(d) *Revocation or modification.* The provisions of this part may be revoked or modified at any time and any license outstanding at the time of such revocation or modification shall be modified thereby to the extent provided in such revocation or modification.

§ 54.3 *Titles and subtitles.* The titles in this part are inserted for purposes of ready reference and are not to be construed as constituting a part of the regulations in this part.

§ 54.4 *Definitions.* (a) As used in this part, the terms:

(1) "The acts" means the Gold Reserve Act of 1934, as amended, and section 5 (b) of the act of October 6, 1917, as amended by section 2 of the act of March 9, 1933 and Title III, section 301 of the "First War Powers Act, 1941" approved December 18, 1941.

(2) "The orders" means Executive Orders Nos. 6260 of August 28, 1933; 6359 of October 25, 1933; and 9193 of July 6, 1942, as amended.

(3) "United States" means the Government of the United States, or where used to denote a geographical area, means the continental United States and all other places subject to the jurisdiction of the United States.

(4) "Continental United States" means the States of the United States, the District of Columbia, and the Territory of Alaska.

(5) "Person" means any individual, partnership, association, or corporation, including the Board of Governors of the Federal Reserve System, Federal Reserve banks, and Federal Reserve agents.

(6) "Mint" means a United States mint or assay office, and wherever authority is conferred upon a "mint" such authority is conferred upon the person locally in charge of the respective United States mint or assay office acting in accordance with the instructions of the Director of the Mint or the Secretary of the Treasury.

(7) "Gold coin" means any coin containing gold as a major element, including gold coin of a foreign country.

(8) "Gold bullion" means any gold which has been put through a process of smelting or refining, and which is in such state or condition that its value depends primarily upon the gold content and not upon its form; the term "gold bullion" includes, but not by way of limitation, semi-processed gold and scrap gold, but it does not include fabricated gold as defined in this section, metals containing less than 5 troy ounces of fine gold per short ton, or unmelted gold coin.

(9) Fabricated and semi-processed gold:

(i) "Fabricated gold" means processed or manufactured gold in any form (other than gold coin or scrap gold) which:

(*a*) Has a gold content the value of which does not exceed 90 percent of the total domestic value of such processed or manufactured gold; and

(*b*) Has, in good faith, and not for the purpose of evading or enabling others to evade the provisions of the acts, the orders, or the regulations in this part, been processed or manufactured for some one or more specific and customary industrial, professional or artistic uses.

(ii) "Semi-processed gold" means processed or manufactured gold in any form (other than gold coin or scrap gold) which:

(*a*) Has a gold content the value of which exceeds 90 percent of the total domestic value of such processed or manufactured gold; and

(*b*) Has, in good faith, and not for the purpose of evading or enabling others to evade the provisions of the acts, the orders, or the regulations in this part, been processed or manufactured for some one or more specific and customary industrial, professional or artistic uses.

(iii) The value of the gold content of an article shall be computed for the purposes of this subparagraph at $35 per troy ounce of fine gold content.

(iv) For the purpose of this subparagraph, the total domestic value of processed or manufactured gold shall be based on the cost to the owner and not the selling price. The allowable ele of such value are:

(*a*) In the case of a manufactu processor, only the cost of materi the article, labor performed on the cle, and processing losses and ove applicable to the manufacture or essing of such article; and

(*b*) In the case of a dealer or person who holds or disposes of without further processing, only th purchase price paid by such perso cluding transportation costs, if an curred in obtaining delivery of article to his usual place of busine

(10) "Scrap gold" means gold fi clippings, polishings, sweepings an like and any other melted or unm scrap gold, semiprocessed gold or f cated gold, the value of which de primarily upon its gold content an upon its form, which is no longer for the use for which it was proc or manufactured.

(11) "Gold in its natural state" m gold recovered from natural so which has not been melted, smelte refined, or otherwise treated by he or by a chemical or electrical pr

(12) "Hold", when used with r ence to gold includes actual or cons tive possession of or the retention o interest, legal or equitable, in such and includes, but not by way of lim tion, acts of agency with respect th although the principal be unknow

(b) Wherever reference is mad this part to equivalents as between lars or currency of the United States gold, $1 or $1 face amount of any rency of the United States equals fif and five twenty-firsts ($15\frac{5}{21}$) g of gold, nine-tenths fine.

(c) Wherever reference is mad this part to "sections", the referenc unless otherwise indicated, to the d nated sections of this part.

§ 54.5 *General provisions affec applications, statements, and rep* Every application, statement, and re required to be made under this part s be made upon the appropriate form scribed by the Secretary of the Tr ury. Action upon any applicatio statement may be withheld pending furnishing of any or all of the infor tion required in such forms or of s additional information as may be dee necessary by the Secretary of the Tr ury, or the agency authorized or dire to act under this part. There shal attached to the applications, stateme or reports such instruments as ma

ired by the terms thereof and such
ier instruments as may be required
ie Secretary of the Treasury, or by
agency.

4.6 *General provisions affecting ses and authorizations.* (a) Li-
es issued pursuant to the regulations
iis part shall be upon the appro-
e form prescribed by the Secretary
e Treasury. Licenses shall be non-
sferable and shall entitle the licensee
quire, hold, transport, melt or treat,
rt, export, or earmark gold only
ch form and to the extent permitted
nd subject to the conditions pre-
ed in, the regulations in this part
such licenses.

Revocation or modification of li-
es: [1] Licenses may be modified or
ed at any time in the discretion
e Director of the Mint. In the event
a license is modified or revoked
r than by a modification or revoca-
of the regulations in this part), the
tor of the Mint shall advise the
see by letter, mailed to the last ad-
of the licensee on file in the Bureau
e Mint. The licensee, upon receipt
h advice, shall forthwith surrender
ense as directed. If the license has
modified but not revoked, the
tor of the Mint shall thereupon
or cause to be issued a modified
e.

Exclusions: The Director of the
may exclude particular persons or
s thereof from the operation of
ection of the regulations in this part
pt §§ 54.28 to 54.30, inclusive) or
es issued thereunder or from the
eges therein conferred. Such ac-
shall be binding upon all persons
ing actual notice or constructive
e thereof. Any violation of the pro-
s of the regulations in this part or
cense issued hereunder, shall con-
e, but not by way of limitation,
ds for such exclusion.

Requests for reconsideration: A
n request for reconsideration of a
l of an application for a license, of
cation, suspension, or modification
existing license, or of an exclusion
the authorizations or privileges
rred in any section of the regula-
in this part setting forth in detail
the reasons for such request, may be addressed to the Director of the Mint, Treasury Department, Washington 25, D. C. In addition, upon written request, the Director will schedule a hearing in the matter at which time there may be brought to the attention of the Bureau of the Mint any information bearing thereon.

(e) No license issued hereunder shall exempt the licensee from the duty of complying with the legal requirements of any State or Territory or local authority.

(f) No license shall be issued to any person doing business under a name which in the opinion of the Secretary of the Treasury or the designated agency issuing the license, is designed or is likely to induce the belief that gold is purchased, treated, or sold on behalf of the United States or for the purpose of carrying out any policy of the United States.

§ 54.7 *General provisions affecting export licenses.*[2] At the time any license to export gold is issued, the Bureau of the Mint, or Federal Reserve bank issuing the same, shall transmit a copy thereof to the collector of customs at the port of export designated in the license. No collector of customs shall permit the export or transportation from the continental United States of gold in any form except upon surrender of a license to export, a copy of which has been received by him from the agency issuing the same (except that licenses on Form TGL–15 (general) covering multiple shipments during a quarterly period are retained by the licensees until the expiration of such period, when they are returned to the Director of the Mint): *Provided, however,* That the export or transportation from the continental United States of fabricated gold may be permitted pursuant to § 54.25 (b) (2) and the export or transportation from the continental United States of gold imported for re-export may be permitted pursuant to §§ 54.32 and 54.33: *And provided further,* That gold held by the Federal Reserve banks under §§ 54.28

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gulations governing procedures for de-
an application for a license, for revok-
spending or modifying a license, and
cluding any person from the privileges
red in the regulations in this part are
th in § 92.31 of this chapter.

[2] The regulations in this part shall not be construed as relieving any person from the obligation of compliance with the regulations of the Bureau of Foreign Commerce (formerly the Office of International Trade), (15 CFR Parts 360 to 399), the Bureau of Customs (19 CFR Chapter I), or other laws or regulations relating to the importation or exportation of merchandise, where applicable to imports or exports of gold, or articles containing gold.

to 54.30, inclusive, may be exported for the purposes of such sections without a license. The collector of customs to whom a license to export is surrendered shall cancel such license and return it to the Director of the Mint or to the Mint or the Federal Reserve bank which issued the same. In the event that the shipment is to be made by mail, a copy of the export license shall be sent by the agency issuing the same to the postmaster of the post office designated in the application, who will act under the instructions of the Postmaster General in regard thereto.

§ 54.8 *General provisions affecting import licenses.* No gold in any form imported into the United States shall be permitted to enter until the person importing such gold shall have satisfied the collector of customs at the port of entry that he holds a license authorizing him to import such gold or that such gold may be imported without a license under the provisions of §§ 54.12 to 54.21, inclusive, or §§ 54.28 to 54.30, inclusive. Postmasters receiving packages containing gold will deliver such gold subject to the instructions of the Postmaster General.

§ 54.9 *Forms available.* Any form, the use of which is prescribed in this part, may be obtained at, or on written request to, any United States mint or assay office, or the Director of the Mint, Treasury Department, Washington 25, D. C.

§ 54.10 *Representations by licensees.* Licensees may include in public and private representations or statements the clause "licensed on form TGL____ (here inserting the number of the form of license held by the licensee) pursuant to the regulations issued by the Secretary of the Treasury," but any representation or statement which might induce the belief that the licensee is acting or is especially privileged to act on behalf of or for the United States, or is purchasing, treating, or selling gold for the United States, or in any way dealing in gold for the purpose of carrying out any policy of the United States, shall be a violation of the conditions of the license.

(a) *Business names and representations generally.* No person doing business under a name which is designed or is likely to induce the belief that gold is being purchased, treated, or sold on behalf of the United States, or any agency thereof, or for the purpose of carrying out any policy of the United States making representations or statem which might induce the belief that s person is acting or is especially pr leged to act on behalf of or for United States, or is purchasing, treat or selling gold for the United States in any way dealing in gold for the p pose of carrying out any policy of United States, may acquire, hold, tra port, melt, or treat, import, export earmark any gold under authority §§ 54.12 to 54.20, inclusive, or §§ 54.2 54.27, inclusive.

§ 54.11 *Civil and criminal penalti*

(a) *Civil penalties.* Attention is dire to section 4 of the Gold Reserve Ac 1934, which provides:

Any gold withheld, acquired, transpo melted or treated, imported, exported, or marked or held in custody, in violatio this Act or of any regulations issued u under, or licenses issued pursuant the shall be forfeited to the United States, may be seized and condemned by like ceedings as those provided by law for forfeiture, seizure, and condemnatio property imported into the United S contrary to law; and in addition any pe failing to comply with the provisions of Act or of any such regulations or lice shall be subject to a penalty equal to t the value of the gold in respect of w such failure occurred (31 U. S. C. 443).

(b) *Criminal punishment.* Atter is also directed to (1) section 5 (b the act of October 6, 1917, as amen which provides in part:

Whoever wilfully violates any of the visions of this subdivision or of any lic order, rule or regulation issued thereu shall, upon conviction, be fined not than $10,000 or, if a natural person, m imprisoned for not more than ten yea both; and any officer, director, or age any corporation who knowingly partici in such violation may be punished like fine, imprisonment, or both. As in this subdivision the term "person" n an individual, partnership, associatio corporation (12 U. S. C. 95a (3)).

This section of the act of October 6, as amended, is applicable to viola of any provisions of this part and to lations of the provisions of any lic ruling, regulation, order, direction, o structions issued by or pursuant t direction or authorization of the S tary of the Treasury pursuant to the ulations in this part or otherwise u section 5 (b) of the act of Octob 1917, as amended.

2) Section 1001 of the United States minal Code, which provides:

hoever, in any matter within the juris-ion of any department or agency of the ted States knowingly and wilfully fal-s, conceals or covers up by any trick, me, or device a material fact, or makes false, fictitious or fraudulent state-ts or representations, or makes or uses false writing or document knowing the e to contain any false, fictitious or dulent statement or entry, shall be fined more than $10,000 or imprisoned not e than five years, or both (18 U. S. C.).

PART B—CONDITIONS UNDER WHICH GOLD AY BE ACQUIRED AND HELD, TRANS-ORTED, MELTED OR TREATED, IMPORTED, XPORTED OR EARMARKED

54.12 *Conditions under which gold be acquired, held, melted, etc.* Gold any form may be acquired, held, sported, melted or treated, imported, rted, or earmarked only to the ex- permitted by and subject to the con-ns prescribed in the regulations in part or licenses issued thereunder.

54.13 *Transportation of gold.* Gold be transported by carriers for per- who are licensed to hold and trans- such gold or who are permitted by regulations in this part to hold and sport gold without a license.

54.14 *Gold situated outside of the ed States.* Gold in any form situ- outside of the United States may acquired, transported, melted or ed, or earmarked or held in custody oreign or domestic account without necessity of holding a license.

54.15 *Gold situated in the posses- of the United States.* Gold in any r. (other than United States gold situated in places subject to the rdiction of the United States beyond e limits of the continental United s may be acquired, transported, d or treated, imported, exported, or arked or held in custody for the ac-t of persons other than residents of continental United States, by per- not domiciled in the continental d States: *Provided, however,* That may be transported from the conti-al United States to the possessions e United States only as authorized § 54.25, 54.32, 54.33, or 54.34, or es issued pursuant thereto.

54.16 *Fabricated gold.* Fabricated d as defined in § 54.4 may be acquired, d transported within the United a s or imported without the necessity of holding a license therefor. Fabricated gold may be exported only as authorized in § 54.25 or in a license issued pursuant to that section.

§ 54.17 *Metals containing gold.* Metals containing not more than 5 troy ounces of fine gold per short ton may be acquired, held, transported within the United States, or imported without the necessity of holding a license therefor. Such metals may be melted or treated, and exported only to the extent permitted by and subject to the conditions prescribed in or pursuant to §§ 54.21 to 54.27, inclusive.

§ 54.18 *Unmelted scrap gold.* Unmelted scrap gold may be acquired, held, transported within the United States, or imported, in amounts not exceeding at any one time 50 fine troy ounces of gold content without the necessity of holding a license therefor. Persons holding licenses issued pursuant to paragraph (a) of § 54.25, or acquiring, transporting, importing or holding gold pursuant to § 54.21, may not acquire, transport, import or hold any gold under authority of this section.

§ 54.19 *Gold in its natural state.* (a) Gold in its natural state, as defined in § 54.4, may be acquired, transported within the United States, imported, or held in custody for domestic account only, without the necessity of holding a license therefor.

(b) Gold amalgam which results from the addition of mercury to gold in its natural state, recovered from natural deposits in the United States or a place subject to the jurisdiction thereof, may be heated to a temperature sufficient to separate the mercury from the gold (but not to the melting temperature of gold) without a license by the person who recovered the gold from such deposits, or his duly authorized agent or employee. The retort sponge so resulting may be held and transported by such person without a license: *Provided, however,* That no such person may hold at any one time an amount of such retort sponge which exceeds in fine gold content 200 troy ounces. Such retort sponge may be acquired from such persons:

(1) By the United States;

(2) By persons holding licenses issued pursuant to paragraph (a) of § 54.25;

(3) By other persons provided that the aggregate amount of such retort sponge acquired and held by such other

persons does not exceed at any one time 200 fine troy ounces of gold content.

(c) Persons acquiring retort sponge under paragraph (b) (3) of this section are authorized to dispose of such retort sponge only to the United States and to persons holding licenses issued pursuant to paragraph (a) of § 54.25.

(d) Except as provided in §§ 54.12 to 54.20, inclusive, and in §§ 54.32 and 54.33, gold in its natural state may be melted or treated or exported only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, §§ 54.21 to 54.27, inclusive.

§ 54.20 *Rare coin.* (a) Gold coin of recognized special value to collectors of rare and unusual coin may be acquired and held, transported within the United States, or imported without the necessity of holding a license therefor. Such coin may be exported, however, only in accordance with the provisions of § 54.25.

(b) Gold coin made prior to April 5, 1933, is considered to be of recognized special value to collectors of rare and unusual coin.

(c) Gold coin made subsequent to April 5, 1933, is presumed not to be of recognized special value to collectors of rare and unusual coin.

SUBPART C—GOLD FOR INDUSTRIAL, PROFESSIONAL, AND ARTISTIC USE

§ 54.21 *Fifty ounce exemption for processors.* (a) Subject to the conditions in paragraph (b) of this section, any person regularly engaged in an industry, profession, or art, who requires gold for legitimate, customary, and ordinary use therein, may, without the necessity of obtaining a Treasury gold license:

(1) Import unmelted scrap gold or acquire gold in any form from any person authorized to hold and dispose of gold in such form and amount under the regulations in this part or a license issued pursuant hereto;

(2) Hold, transport, melt, and treat such gold;

(3) Furnish unmelted scrap gold to the United States, to persons operating pursuant to §§ 54.18 or 54.21, or to the holder of a license issued pursuant to paragraph (a) of § 54.25; and

(4) Furnish melted scrap gold to the United States or to the holder of a license issued pursuant to paragraph (a) of § 54.25 which authorizes the acquisition of such melted scrap gold.

(b) The privileges of paragraph (a) of this section are granted subject to the following conditions:

(1) That the aggregate amoun such gold acquired, held, transpo melted and treated, and imported, not exceed, at any one time, 50 fine ounces of gold content (not inclu gold which may be acquired, held, without a license under any other tion of this part, except § 54.18);

(2) That the aggregate amoun such gold acquired, held, transpo melted and treated, and imported, not exceed, in any calendar month fine troy ounces of gold content including gold which may be acqu held, etc., without a license under other section of this part, ex § 54.18);

(3) That such gold is acquired held only for processing into fabric gold, as defined in § 54.4, by such pe in the industry, profession, or ar which he is engaged; and

(4) That full and exact records kept and furnished in compliance § 54.26.

(c) Persons acquiring, holding, tr porting, melting and treating, and porting gold under authority of section are not authorized:

(1) To consign gold bullion, inclu semi-processed gold, to other person processing except that scrap gold for processing and return in semi-p essed form, be consigned to the ho of a license issued pursuant to paragr (a) of § 54.25, which authorizes the quisition and melting and treatin such gold;

(2) To furnish melted scrap gol persons operating pursuant to the visions of this section or § 54.18;

(3) To dispose of gold held under thority of this section otherwise tha the form of fabricated gold or scrap g

(d) Persons holding licenses iss pursuant to paragraph (a) of § 54.2 acquiring, holding, transporting, or porting, gold pursuant to § 54.18 not acquire, hold, transport, melt treat, or import, any gold under aut ity of this section.

§ 54.22 *Licenses required.* Excep permitted in §§ 54.12 to 54.20, inclus and § 54.21, gold may be acquired held, transported, melted or treated, ported, exported or earmarked for inc trial, professional or artistic use onl the extent permitted by licenses iss under § 54.25.

§ 54.23 *Issuance of licenses or gen authorizations.* The Director of

Mint may issue or cause to be issued licenses or other authorizations permitting the acquisition and holding, transportation, melting and treating, importing and exporting of gold which the Director is satisfied is required for legitimate and customary use in industry, profession, or art, by persons regularly engaged in the business of furnishing or processing gold for industry, profession, art, or for sale to the United States.

§ 54.24 *Applications.* Every application for a license under paragraph (a) of § 54.25 shall be made on Form TG–12 except that applications for export licenses shall be made on Form TG–15) and shall be filed in duplicate with the Director of the Mint, Treasury Department, Washington, D. C. Every application for a license under paragraph (a) of § 54.25 shall state in his application whether or not any applications have been filed by or licenses issued to any partnership, association, or corporation in which the applicant has a substantial interest or, if the applicant is a partnership, association, or corporation, by or to any person having a substantial interest in such partnership, association or corporation. The Director of the Mint shall not issue any license to any person if in the judgment of the Director more than one license for the same purpose will be issued for the principal use or benefit of the same persons or interests. Any person licensed under this subpart acquiring a principal interest in any partnership, association, or corporation, holding a license under this subpart for like purpose shall immediately so inform the Director of the Mint.

§ 54.25 *Licenses*—(a) *Licenses for the acquisition and holding, transportation, melting and treating, importing and distribution of gold.* (1) Upon receipt of the application and after obtaining such additional information as may be deemed advisable, the Director of the Mint, shall, if satisfied that gold is necessary for the legitimate and customary requirements of the applicant's industry, profession, art, or business, and that the applicant is qualified in all respects to conduct gold operations in full compliance with the provisions of this part and the provisions of a Treasury gold license, issue or cause to be issued to the applicant a Treasury gold license on the appropriate form for the kind of industry, profession, art, or business, in which the applicant is engaged.

(2) Licenses issued under this section may authorize the licensee to acquire and hold not to exceed a maximum amount specified therein; to transport such gold, melt or treat it to the extent necessary to meet the requirements of the industry, profession, art or business for which it was acquired and held or otherwise to carry out the purposes for which it is held under license; and to import gold so long as the aggregate amount of all gold held after such importation does not exceed the maximum amount authorized by the license to be held.

(3) Licenses issued under this paragraph do not permit the exportation or transportation from the continental United States of gold in any form. Such exportation or transportation is permitted only to the extent authorized in paragraph (b) of this section or in a separate license issued pursuant to such paragraph.

(b) *Licenses and authorizations for the exporting of gold*—(1) *Semi-processed gold.* Semi-processed gold as defined in § 54.4 may be exported or transported from the continental United States only pursuant to a separate export license. Such licenses shall be issued by the Director of the Mint upon application made on Form TG–15 establishing to the satisfaction of the Director that the gold to be exported is semi-processed gold and that the export or transport from the continental United States is for a specific and customary industrial, professional, or artistic use and not for the purpose of using or holding or disposing of such semi-processed gold beyond the limits of the continental United States as, or in lieu of money, or for the value of its gold content.

(2) *Fabricated gold.* Fabricated gold as defined in § 54.4 may be exported or transported from the continental United States without the necessity of obtaining a Treasury gold license: *Provided, however,* That the Bureau of the Census Schedule B statistical classification number of each specific commodity to be exported shall be plainly marked on the outside of the package or container, the shipper's export declaration shall contain a statement that such gold is fabricated gold as defined in § 54.4 and is being exported pursuant to the authorization contained in this subparagraph, and such additional documentation shall be furnished as may be required by the Bureau of Customs or any other government agency charged with the enforce-

ment of laws relating to the exportation of merchandise from the United States.

(3) *Rare coin.* (i) Rare gold coin, as defined in § 54.20, made prior to April 5, 1933, may be exported or transported from the continental United States without the necessity of obtaining a Treasury gold license: *Provided, however,* That the shipper's export declaration shall contain a statement that such coin is rare gold coin and is being exported pursuant to the authorization contained in this subparagraph and such additional documentation shall be furnished as may be requested by the Bureau of Customs or any other government agency charged with the enforcement of laws relating to the exportation of merchandise from the United States.

(ii) Gold coin made subsequent to April 5, 1933, may be exported or transported from the continental United States only under license on Form TGL–11 issued by the Director of the Mint. Application for such a license shall be executed on Form TG–11 and filed with the Director of the Mint, Treasury Department, Washington 25, D. C.

(4) *Other exports of gold.* Export licenses may also be issued upon application made on Form TG–5B in the same manner as prescribed in subparagraph (1) of this paragraph, authorizing the exportation of gold in any form for refining or processing subject to the condition that the refined or processed gold (or the equivalent in refined or processed gold) be returned to the United States, or subject to such other conditions as the Director may prescribe.

§ 54.26 *Investigations; records; subpoenas.* (a) The Director of the Mint is authorized to make or cause to be made such studies and investigations, to conduct such hearings, and to obtain such information as the Director deems necessary or proper to assist in the consideration of any applications for licenses, or in the administration and enforcement of the acts, the orders, and the regulations in this part.

(b) Every person holding a license issued under paragraph (a) of § 54.25, or acquiring, holding or disposing of gold pursuant to the authorizations in §§ 54.18 and 54.21, shall keep full and accurate records of all his operations and transactions with respect to gold, and such records shall be available for examination by a representative of the Treasury Department until the end of the third calendar year (or if such person's accounts are kept on a fiscal y basis, until the end of the third fis year) following such operations or tra actions. The records required to be k by this section shall include the na address, and Treasury gold license nu ber of each person from whom gol acquired or to whom gold is deliver and the amount, date, description a purchase or sales price of each such quisition and delivery, and any ot records or papers required to be k by the terms of a Treasury Departm gold license. If the person from wh gold is acquired, or to whom gold is livered, does not have a Treasury g license such records shall show, in of the license number of such pers the section of the regulations in this p pursuant to which such gold was h or acquired by such person. Such r ords shall also show all costs and penses entering into the computation the total domestic value of articles fabricated or semi-processed gold as fined in § 54.4.

(c) The Director of the Mint (or officers and employees of the Bureau the Mint specifically designated by Director) or any department or age charged with the enforcement of acts, the orders, or the regulations this part, may require any person permit the inspection and copying records and other documents and inspection of inventories of gold and furnish, under oath or affirmation otherwise, complete information re tive to any transaction referred to in acts, the orders, or the regulations this part involving gold or articles ma factured from gold. The records wh may be required to be furnished shall clude any records required to be kept this section and, to the extent that production of such information is nec sary and appropriate to the enforcem of the provisions of the acts, the orde and the regulations in this part, or censes issued thereunder, any other r ords, documents, reports, books, counts, invoices, sales lists, sales sli orders, vouchers, contracts, receipts, b of lading, correspondence, memoran papers and drafts, and copies there either before or after the completion the transaction to which such reco refer.

(d) The Director of the Mint may a minister oaths and affirmations and m whenever necessary, require any pers holding a license under § 54.25 or a quiring, holding or disposing of gold pu

nt to the authorizations of §§ 54.18 54.21, or any officer, director, or em- yee of such person, to appear and tes- or to appear and produce any of the ords specified in paragraph (c) of this ion or both, at any designated place.

54.27 *Reports.* Every person hold- a license issued pursuant to para- ph (a) of § 54.25 shall make reports the appropriate report form specified such license for the six months' pe- ds ending on the last days of June and ember, respectively, and shall file reports with the Director of the t, Treasury Department, Washing- 25, D. C. Reports shall be filed in twenty-five days after the ter- ation of the period for which such orts are made.

PART D—GOLD FOR THE PURPOSE OF TTLING INTERNATIONAL BALANCES AND R OTHER PURPOSES

54.28 *Acquisitions by Federal Re- e banks for purposes of settling in- ational balances, etc.* The Federal erve banks may from time to time uire from the United States by re- ption of gold certificates in accord- e with section 6 of the Gold Reserve of 1934 such amounts of gold bullion n the judgment of the Secretary of Treasury, are necessary to settle in- ational balances or to maintain the l purchasing power of every kind currency of the United States. Such s may also acquire gold (other than ted States gold coin) abroad or from ate sources within the United States.

54.29 *Dispositions by Federal Re- e banks.* The gold acquired under 28 may be held, transported, im- ed, exported, or earmarked for the oses of settling international bal- s or maintaining the equal purchas- power of every kind of currency of United States: *Provided,* That if the is not used for such purposes within nths from the date of acquisition, it l (unless the Secretary of the Treas- shall have extended the period in which such gold may be so held) aid and delivered to the Treasurer he United States against payment for by credits in equivalent amounts ollars in the accounts authorized r the sixteenth paragraph of section of the Federal Reserve Act, as ded (48 Stat. 339; 12 U. S. C. 467).

54.30 *Provisions limited to Federal rve banks.* The provisions of this art shall not be construed to permit any person subject to the jurisdiction of the United States, other than a Federal Reserve bank, to acquire gold for the purposes specified in this subpart or to permit any person to acquire gold from a Federal Reserve bank except to the extent that his license issued under this part specifically so provides.

SUBPART E—GOLD FOR OTHER PURPOSES NOT INCONSISTENT WITH THE PURPOSES OF THE GOLD RESERVE ACT OF 1934 AND THE ACT OF OCTOBER 6, 1917, AS AMENDED

§ 54.31 *Licenses required.* Gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked for purposes other than those specified in §§ 54.21 to 54.30, inclusive, not inconsistent with the purposes of the acts only to the extent permitted in §§ 54.12 to 54.20 inclusive, and § 54.32, or under a license issued under §§ 54.33 or 54.34.

§ 54.32 *Gold imported in gold-bearing materials for re-export.* (a) Gold refined (or the equivalent to gold refined) from gold-bearing materials imported into the United States for refining and re-export may be re-exported to the foreign exporter or pursuant to his order, without the necessity of obtaining a Treasury gold export license, subject to the following conditions:

(1) The imported gold-bearing material either (i) was imported into the United States from a foreign resident or a foreign organization, or (ii) was mined by a branch or other office of a United States organization and imported into the United States from such branch or office;

(2) The importer has no right, title, or interest in the gold refined from the imported gold-bearing material other than through its branch or office which is the foreign exporter as provided in subparagraph (1) (i) and (ii) of this paragraph, and the importer will not participate in the sale of such refined gold or receive any commission in connection with the sale of such refined gold;

(3) The refined gold is to be re-exported to the foreign exporter or, pursuant to his order, to a foreign resident or foreign organization; and

(4) Such gold is imported, acquired, and held, transported, melted and treated, as permitted in §§ 54.12 to 54.20, inclusive, or in accordance with a license issued under § 54.25, and in full

compliance with the provisions of paragraph (b) of this section.

(b) *Procedural requirements.* Persons exporting gold pursuant to paragraph (a) of this section shall comply with the following requirements:

(1) *Notation upon entry.* Upon the formal entry into the United States of any gold-bearing materials, the importer shall declare to the collector of customs at the port where the material is formally entered that the importation is made with the intention of exporting the gold refined therefrom to the foreign exporter, or pursuant to his order. The collector shall make on the entry a notation to this effect and forward a copy of the entry to the United States assay office at New York or to the United States mint at San Francisco, whichever is designated by the importer.

(2) *Sampling and assaying.* Promptly upon the receipt of each importation of gold-bearing material at the plant where it is first to be treated, it shall be weighed, sampled, and assayed for the gold content. A reserve commercial sample shall be retained by such plant for at least 1 year from the date of importation, unless the assay is sooner verified by the Bureau of the Mint.

(3) *Plant records.* The importer shall cause an exact record, covering each importation, to be kept at the plant of first treatment. The records shall show the gross wet weight of the importation, the weight of containers, if any, the net wet weight, the percentage and weight of moisture, the net dry weight, and the gold content shown by the settlement assay. A true copy of such record shall be filed promptly with the assay office in New York or the mint at San Francisco, whichever has been designated to receive a copy of the entry. The plant records herein required to be kept shall be available for examination by a representative of the Treasury Department for at least 1 year after the date of the disposition of such gold.

(4) *Limitations on exports.* The gold refined (or the equivalent to gold refined) from imported gold-bearing materials shall be exported not later than seven months from the date of entry of such gold-bearing materials and shall not exceed the amount of gold shown on the refiner's settlement sheet as having been recovered from the imported gold-bearing material: *Provided,* That, such gold may be exported prior to the procurement of the refiner's settlement sheet in an amount not in excess of 90 percent of a written estimate of the g content of the gold-bearing mate based upon the actual test assay of su material.

(5) *Export declaration and certific* The exporter shall state on his exp declaration that the shipment is g refined (or the equivalent to gold fined) from imported gold-bearing m terials which is being exported pursu to the authorization contained in t section, and shall attach to his exp declaration a certificate properly e cuted in duplicate on Form TG–16 a two true copies of the refiner's settlem sheet. In the event that exportatio made prior to procurement of the set ment sheet, duplicate certified copies the report of the actual test assay the gold-bearing material, together w a statement showing that an exportat with respect to such material is nec sary prior to the time the settlem sheet can be procured, shall be subm ted by the exporter with his export dec ration and certificate on Form TG- The collector of customs shall forw a copy of the certificate on Form TG- and a copy of the settlement sheet, the report of the test assay, to the Uni States assay office at New York or t United States mint at San Francis whichever has been designated to rece a copy of the entry.

§ 54.33 *Gold imported for re-port*[3]—(a) *Exportation promptly wi out license.* Gold may be imported a transported for prompt export, and ported without the necessity of holdi a license, provided the gold is, in fa exported promptly and remains un customs custody throughout the per during which it is within the custo limits of the United States. Upon t arrival in the United States of gold i ported for re-export pursuant to t provisions of this section, the impor shall declare to the collector of custo at the port of entry that it will be exported promptly. The collector customs shall make a notation of t declaration upon the entry and forwa a copy of the entry to the Director of t Mint.

(b) *Exportation pursuant to licen* In the event that the export of any g imported pursuant to this section is d layed due to the unavailability of faci

[3] Attention is directed to Order No. 29 the Foreign-Trade Zones Board (17 F. 5316; 15 CFR 400.803) which is applica to gold.

for the onward transportation of
gold, the Director of the Mint may,
ect to the following provisions, issue
ıses on Form TGL–17 authorizing
importation, holding, transportation,
exportation of gold which the Direc-
is satisfied is, in fact, imported for
xport promptly upon the completion
ecessary arrangements for the trans-
ation of such gold.
) Every application for a license un-
this section shall be made on form
17 and shall be filed with the Direc-
of the Mint.
) Upon receipt of the application
after making such investigation of
ase as may be deemed advisable, the
ctor of the Mint, if satisfied that the
was, in fact, imported for re-export
nptly upon the completion of neces-
arrangements for the transporta-
of such gold, shall issue to the ap-
ınt a license on form TGL–17.

54.34 *Licenses for other purposes.*
Secretary of the Treasury, with the
oval of the President, shall issue
ıses authorizing the acquisition,
sportation, melting or treating, im-
ing, exporting, or earmarking of
, for purposes other than those speci-
in §§ 54.21 to 54.30, inclusive, 54.32
54.33, which, in the judgment of the
etary of the Treasury, are not in-
istent with the purposes of the acts,
ect to the following provisions:
) *Applications.* Every application
a license under this section shall be
e on form TG–18 and shall be filed
luplicate with the Federal Reserve
k for the district in which the appli-
resides or has his principal place
usiness. Upon receipt of the appli-
on and after making such investiga-
of the case as it may deem advisable,
Federal Reserve bank shall trans-
to the Secretary of the Treasury the
inal of the application, together with
supplemental information it may
n appropriate. The Federal Reserve
k shall retain the duplicate of the
ication for its records.
) *Licenses.* If the issuance of a li-
e is approved, the Federal Reserve
k which received and transmitted the
ication will be advised by the Sec-
ry of the Treasury and directed to
e a license on form TGL–18. If a
ıse is denied, the Federal Reserve
k will be so advised and shall imme-
ely notify the applicant. The deci-
of the Secretary of the Treasury
respect to the granting or denying
license shall be final. If a license is
granted, the Federal Reserve bank shall thereupon note upon the duplicate of the application therefor, the date of approval and issuance and the amount of gold specified in such license.

(c) *Reports.* Within 7 business days of the date of disposition of the gold acquired or held under a license issued under this section, or within 7 business days of the date of export, if such exportation is authorized, the licensee shall file a report in duplicate on form TGR–18 with the Federal Reserve bank through which the license was issued. Upon receipt of such report, the Federal Reserve bank shall transmit the original thereof to the Secretary of the Treasury, and retain the duplicate for its records.

SUBPART F—PURCHASE OF GOLD BY MINTS

§ 54.35 *Purchase by mints.* The mints, subject to the conditions specified in the regulations in this part, particularly § 54.36 to § 54.44, and the general regulations governing the mints, are authorized to purchase:

(a) Gold recovered from natural deposits in the United States or any place subject to the jurisdiction thereof, which shall not have entered into monetary or industrial, professional, or artistic use, including gold contained in deposits of newly mined domestic silver;

(b) Gold contained in deposits of silver eligible for deposit at a mint for return in bar form;

(c) Scrap gold as defined in § 54.4;

(d) Gold refined from sweeps purchased from a United States mint;

(e) Gold (other than United States gold coin) imported into the United States after January 30, 1934;

(f) Gold refined (or the equivalent to gold refined) from imported gold-bearing material; and

(g) Such other gold (other than United States gold coin or gold derived therefrom) as may be authorized from time to time by rulings of the Secretary of the Treasury.

Provided, however, That no gold shall be purchased by any mint under the provisions of this subpart which, in the opinion of the mint, has been held at any time in noncompliance with the acts, the orders, or any regulations, rulings, instructions, or licenses issued thereunder, including the regulations in this part, or in noncompliance with section 3 of the act of March 9, 1933, or any orders,

regulations, rulings, or instructions issued thereunder.[1]

§ 54.36 *Gold recovered from natural deposits in the United States or any place subject to the jurisdiction thereof, including gold contained in deposits of newly mined domestic silver.* (a) The mints may purchase gold under § 54.35 (a) only if the deposit of such gold is accompanied by a properly executed statement as follows:

(1) A statement on form TG–19 shall be filed with each delivery of gold by persons who have recovered such gold by mining or panning in the United States or any place subject to the jurisdiction thereof.

(2) A statement on form TG–20 shall be filed with each delivery of gold by persons who have recovered such gold from gold-bearing materials in the regular course of their business of operating a custom mill, smelter, or refinery.

(3) A statement on form TG–21 together with a statement giving the names of the persons from whom gold was purchased, the amount and description of each lot of gold purchased, the location of the mine or placer deposit from which each lot was taken, and the period within which such gold was taken from the mine or placer deposit, shall be filed with each such delivery of gold by persons who have purchased such gold directly from the persons who have mined or panned such gold.

(b) In addition, the depositors shall show that the gold was acquired, held, melted and treated, and transported by them in accordance with a license issued pursuant to § 54.25 or that such acquisition, holding, melting and treating, and transportation is permitted under §§ 54.12 to 54.20, inclusive, without the necessity of holding a license.

§ 54.37 *Gold contained in deposits of silver.* Gold contained in deposits of silver, eligible at a mint for return in bar form, may be purchased by the mints: *Provided,* That the gold was not mixed with such silver for the purposes of selling gold to the United States which was not eligible for purchase by the United States under paragraphs (a), (c), (e), or (f) of § 54.35.

§ 54.38 *Scrap gold.* Deposits of s gold must be accompanied by a st ment executed on form TG–22. In a tion the depositors of such gold s establish to the satisfaction of the that the gold was acquired, held, transported by them in accordance the regulations in this part or a lic issued pursuant thereto.

§ 54.39 *Gold refined from sweeps chased from a United States mint.* refined from sweeps purchased fro United States mint shall be purch only if the deposit of such gold is acc panied by a statement executed on f TG–28.

§ 54.40 *Imported gold.* Except gold which may be purchased in acc ance with the provisions of § 54.41, mints are authorized to purchase such gold imported into the Un States as has been in customs cus throughout the period in which it s have been situated within the cust limits of the continental United St and then only subject to the follo provisions:

(a) *Notation upon entry.* Upon mal entry into the United States of gold intended for sale to a mint u this subpart, the importer shall dec to the collector of customs at the of entry where the gold is formally tered that the gold is entered for s sale. The collector shall make a n tion of this declaration upon the e and forward a copy to the mint de nated by the importer.

(b) *Statement by importer.* Upon deposit of the gold with the mint de nated by the importer, the importer s file a statement executed in dupli on form TG–23.

§ 54.41 *Gold refined from impor gold-bearing material.* The mints authorized to purchase gold refined the equivalent to gold refined) f gold-bearing material which has b either imported into the United St pursuant to a license issued under p agraph (a) of § 54.25 for sale of the g derived therefrom to a designated m or imported into the United States un § 54.32 (notwithstanding the declarat made by the importer upon the en into the United States of such gold-be ing material as required by § 54.32 (b whether or not such gold or gold-bear material has been in customs cust throughout the period it has been in

[1] Gold which has been so held in noncompliance with section 3 of the act of March 9, 1933, or the Order of the Secretary of the Treasury of December 28, 1933, may, however, be purchased in accordance with the Instructions of the Secretary of the Treasury of January 17, 1934 (§ 53.1 of this chapter), subject to the rights reserved in such Instructions and at the price stated therein.

oms limits of the continental United
es, subject to the following provi-
s:

) In the case of gold-bearing mate-
imported pursuant to license issued
r paragraph (a) of § 54.25, the im-
er shall declare to the collector of
oms at the port of entry that the
l-bearing material is being imported
ale of the gold refined therefrom to
signated mint; the collector shall
e on the entry a notation to this
t and forward a copy thereof to the
designated by the importer.

() In the case of gold-bearing mate-
imported under § 54.32, if the gold
ed therefrom is offered to a mint
r than the mint at San Francisco
e assay office at New York, the im-
er shall have caused the copy of the
y described in § 54.32 (b) to be
rarded to the mint to which he is
ing the gold for sale.

() Before any gold may be purchased
r this section, the requirements of
32 (b) (2) and (3) must be shown
ave been complied with: *Provided, ever,* That any person importing
l-bearing materials for sale of the
l refined therefrom to a mint other
a the mint at San Francisco or the
s office at New York shall have
ed the true copy of the record de-
ed in § 54.32 (b) (3) to be forwarded
e mint to which he is offering the
l for sale.

() Upon presentation of the gold to
nt or assay office for purchase, the
rter shall file a statement executed
plicate on form TG–26, together
t two true copies of the settlement
e covering the gold-bearing material
rted.

(No gold shall be accepted for pur-
a under authority of this paragraph
l s it is delivered to the mint and all
te terms hereof complied with within
v months from the date of the for-
entry into the United States of the
l bearing material from which it was
t cted.

§ 4.42 *Deposits.* Deposits of gold
s ibed in § 54.35 and rulings issued
e under will be received in amounts of
t ess than 1 troy ounce of fine gold
n deposited in the following forms:
ets, grains, and dust which are in
e native state free from earth and
r, or nearly so, retort sponge, lumps,
n, bars, kings, buttons, and scrap
l as defined in § 54..4. All deposits
n ining 800 thousandths or more of
s metal shall be rejected. In the case of gold forwarded to a mint by mail or express, a letter of transmittal shall be sent with each package. When there is a material discrepancy between the actual and invoice weights of a deposit, further action in regard to it will be deferred pending communication with the depositor.

§ 54.43 *Rejection of gold by mint.* Deposits of gold which do not conform to the requirements of §§ 54.35 to 54.42, inclusive, or which otherwise are unsuitable for mint treatment shall be rejected and returned to the person delivering the same at his risk and expense. The mints shall not purchase gold under the provisions of this subpart from any person who has failed to comply with the regulations in this part or the terms of a Treasury gold license. Any deposit of gold which has been held in noncompliance with the acts, the orders, or any regulations, rulings, instructions or licenses issued thereunder, including the regulations in this part, or in noncompliance with section 3 of the act of March 9, 1933, or any orders, regulations, rulings, or instructions issued thereunder, may be held subject to the penalties provided in § 54.11 or section 3 of the act of March 9, 1933.

§ 54.44 *Purchase price.* The mints shall pay for all gold purchased by them in accordance with this subpart $35.00 (less one-fourth of 1 percent) per troy ounce of fine gold, but shall retain from such purchase price an amount equal to all mint charges. This price may be changed by the Secretary of the Treasury without notice other than by notice of such change mailed or telegraphed to the mints.

SUBPART G—SALE OF GOLD BY MINTS

§ 54.51 *Authorization to sell gold.* Each mint is authorized to sell gold to persons holding licenses issued pursuant to § 54.25, or to persons authorized under § 54.21 to acquire such gold for use in industry, profession, or art: *Provided, however,* That except in justified cases, no mint may sell gold to any person in an amount which, in the opinion of such mint, exceeds the amount actually required by such person for a period of 3 months. Prior to the sale of any gold under this subpart, the mint shall require the purchaser to execute and file in duplicate a statement on form TG–24, or, if such purchaser is in the business of furnishing gold for use in industries, professions, and arts, on form TG–25.

The mints are authorized to refuse to sell gold in amounts less than 25 ounces, and shall not sell gold under the provisions of this subpart to any person who has failed to comply with the regulations in this part or the terms of his license.

§ 54.52 *Sale price.* The mints shall charge for all gold sold under this article $35.00 (plus one-fourth of 1 percent) per troy ounce of fine gold plus the regular mint charges. This price may be changed by the Secretary of the Treasury without notice other than by notice of such change mailed or telegraphed to the mints.

SUBPART H—TRANSITORY PROVISIONS

§ 54.70 *Legal effect of amendment of regulations.* This amendment of the Gold Regulations shall not affect any a done or any right accruing or accrue or any suit or proceeding had or com menced in any civil or criminal cau prior to the effective date of this amend ment but all such liabilities shall con tinue and may be enforced as if sa amendment had not been made.

NOTE: The record-keeping and reporti requirements of these regulations have bee approved by the Bureau of the Budget accordance with the Federal Reports A of 1942.

[SEAL] H. CHAPMAN ROSE,
Acting Secretary of the Treasury.

[F. R. Doc. 54–5329; Filed, July 13, 195 8:48 a. m.]

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No. 14858

In the United States Court of Appeals for the Ninth Circuit

GLADYS LAYCOCK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

A memorandum opinion of the district court filed April 22, 1955 (R. 12-14), has not been reported.

JURISDICTION

This is an appeal from an order entered by the district court on May 18, 1955, dismissing appellant's complaint (R. 14). The jurisdiction of the district court over the United States was sought to be invoked under 28 U.S.C. sec. 1346(a)(2), (R. 3). On July 15, 1955, appellant filed her notice of appeal (R. 15). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

STATUTES INVOLVED

1. 28 U.S.C. sec. 2401(a) provides in pertinent part as follows:

> Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action accrues.

2. The Act of August 27, 1935, Ch. 780, Sec. 2, 49 Stat. 938, 939, 31 U.S.C. sec. 773(b), provides in pertinent part as follows:

> Any consent which the United States may have given to the assertion against it of any right, privilege, or power whether by way of suit, counterclaim, set-off, recoupment, or other affirmative action * * * in any proceeding of any nature whatsoever * * * (3) upon any claim or demand arising out of any surrender, requisition, seizure, or acquisition * * * of any gold or silver and involving the effect or validity of any change in the metallic content of the dollar or other regulation of the value of money, is withdrawn * * *.

3. Presidential Proclamation 2914 of December 16, 1950, 15 F.R. 9029, provides in pertinent part as follows:

> WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and
>
> WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS, if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to choose those who conduct their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

4. Pertinent provisions of the Gold Reserve Act of 1934, 48 Stat. 337, 12 U.S.C. sec. 213; the Trading with the Enemy Act, as amended by the Emergency Banking Relief Act of March 9, 1933, 48 Stat. 1, 12 U.S.C. sec. 95(a); Executive Order 6260, as amended, 12 U.S.C. following sec. 95(a); and United States Treasury Department Gold Regulations, 31 C.F.R. Part 54, as amended, 19 F.R. 4309-4316, the validity and constitutionality of which are challenged by the appellant, are set forth in the Appendix, pp. 30-34, *infra*.

QUESTIONS PRESENTED

1. Whether recovery for a taking can be based upon acts of government officers unauthorized because of unconstitutionality of the statute pursuant to which the acts were performed.

2. Whether the injuries which might result from the Government's monetary and gold regulation, could constitute a "taking" for which just compensation is required by the Fifth Amendment to the Constitution.

3. Whether the Gold Reserve Act of 1934, 48 Stat. 337, 12 U.S.C. sec. 213; the Trading with the Enemy Act, as amended by the Emergency Banking Relief Act of March 9, 1933, 48 Stat. 1, 12 U.S.C. sec. 95(a), and Executive Orders and administrative regulations issued thereunder concerning the valuation, acquisition and hoarding of gold are valid and constitutional.

4. Whether, when the complaint shows on its face that the Acts challenged were passed by Congress over 20 years ago, such action can be maintained in view of the six-year statute of limitations provision of 28 U.S.C. sec. 2401(a).

5. Whether, in the face of the Act of August 27, 1935, Ch. 780, Sec. 2, 49 Stat. 938, 939, 31 U.S.C. sec. 773(b), by which Congress expressly withdrew any consent to suit against the United States arising "upon any claim or demand arising out of any surrender, requisition, seizure, or acquisition * * * of any gold or silver and involving the effect or validity of any change in the metallic content of the dollar or other regulation of the value of money", appellant's complaint alleged facts sufficient to establish jurisdiction over the United States.

STATEMENT

Appellant commenced this action on November 10, 1954, by the filing of a complaint which sought to invoke the jurisdiction of the District Court under the Tucker Act, 28 U. S. C. sec. 1346(a) (2), (R. 3). The complaint alleges that certain statutes enacted by the Congress in 1917, 1933 and 1934 and certain Executive Orders and administrative regulations issued pursuant thereto generally relating to transactions in gold are invalid and unconstitutional (R. 5-10). The complaint alleges further that these allegedly invalid statutes, Executive Orders and regulations prevented appellant from making lawful use of her property, a gold mine, directly interfered with her right to own and enjoy the use of private property, and deprived her of her property without due process of law and without just compensation (R. 6-10).

The United States moved to dismiss the complaint on the grounds (1) that the complaint showed on its face that the acts constituting the alleged wrong committed by the defendant occurred more than six years prior to the filing of the complaint and hence the action is barred by the statute of limitations; (2) that the complaint fails to state a claim or cause of action upon which relief can be granted; and (3) that the complaint fails to allege facts sufficient to establish jurisdiction over the United States (R. 10-11).

On April 22, 1955, the District Court filed its opinion (R. 12-14) concluding that appellant's damages (R. 13-14):

> are indirect and consequential, resulting from the Government's monetary and gold regulations, and do not result from a "taking" by the Government,

> the only basis upon which plaintiff may under the Tucker Act claim a breach of an implied contract with the United States based upon an infringement of her constitutional rights.

An appropriate order dismissing the complaint was entered on May 18, 1955 (R. 14). This appeal followed (R. 15).

ARGUMENT

I

Even if Appellant's Attack Upon the Statutes and Regulations Relating to Gold Were Valid, Recovery in the Present Case Cannot be Justified Because Any Alleged Taking Would be Unauthorized

Initially we point out that the appellant defeats her own claim for damages as for a taking under the Fifth Amendment. Even if it be assumed that there were a taking in this case, appellant insists that the laws and regulations under which the alleged taking was supposedly accomplished are unconstitutional and hence invalid. If that is so, it is settled that appellant cannot recover from the United States because of lack of authorized action. In *United States* v. *North American Co.*, 253 U. S. 330, 334 (1920), the Supreme Court said:

> Power to take possession of the company's mining claim was not vested by law in General Randall; and the Secretary of War had not, so far as appears, either authorized it or approved it before December 8, 1900 * * *. What he had done before that date having been without authority, and hence tortious, created no liability on the part of the Government.[1]

---

[1] The appellant has not invoked the Federal Tort Claims Act, 62 Stat. 993, 28 U.S.C. sc. 1346(b), (R. 3; Br. 14-18), hence lia-

Accord: *United States* v. *Goltra,* 312 U.S. 203, 208 (1941); *Mitchell* v. *United States,* 267 U. S. 341, 345 (1925); *Hooe* v. *United States,* 218 U. S. 322, 333-334 (1910); *Hughes* v. *United States,* 230 U. S. 24, 35 (1913); *Bussey* v. *United States,* 70 C. Cls. 104, 118 (1930). Cf. *Youngstown Co.* v. *Sawyer,* 343 U. S. 579, 585 (1952). It necessarily follows that if the regulation of gold transactions was invalid, there could not be any authorized taking thereunder.

II

The Challenged Actions Were in Exercise of Regulatory Powers of the United States and Could Not, Even If Invalid, Constitute an Exercise of the Power of Eminent Domain

Appellant alleges damage by reason of the enactment of laws and regulations concerning the regulation of gold by the Government (R. 5-10). Appellant's action, filed under the Tucker Act [28 U. S. C. sec. 1346(a)(2)] does not purport to involve any express contract with the Government (R. 3). Rather, appellant's claim is that the Tucker Act gives her a remedy because her property was "taken" in violation of the just compensation provision of the Fifth Amendment (R. 3, 9). Yet, as the District Court points out (R. 13), appellant "does not claim a physical appropriation or a destruction or a taking of her mines or of the gold ore which they contain." The District Court properly concluded (R. 13):

> her damages are indirect and consequential, resulting from the Government's monetary and gold regulations, and do not result from a "taking" by

---

bility under that act need not be discussed. However, we do not understand that recovery may be had under that Act for unconstitutional actions of government officers.

the Government, the only basis upon which plaintiff may under the Tucker Act claim a breach of an implied contract with the United States based upon an infringement of her constitutional rights.

Analysis of the cases, including all those cited by the appellant (*infra,* pp. 15-16, 19, 23, 25), shows that to constitute a "taking" within the reach of the Fifth Amendment, there must be an appropriation to a public use of a thing of value. While such appropriation can be by destroying property in the accomplishment of a public use (e. g., *United States* v. *Welch,* 217 U. S. 333, 339 (1910)), in each case, in the words of the District Court, "there was an actual physical taking of an ascertainable thing of value, such as real or personal property or an interest therein, converted to a public use" (R. 13). Neither appellant's mines nor her mineral bearing ore has been either taken or destroyed. If any profit which she might expect from mining her ore has been impaired because of the Government's monetary and gold regulations, her damages are clearly indirect and consequential and do not result from a "taking" by the Government.

The distinction between the injuries that may follow as a consequence of government regulations, as contrasted with an exercise of the eminent domain power, has been made many times. The distillers of the country complained that their property was being taken without due process of law and just compensation after adoption of the Eighteenth Amendment and enactment of the Federal Prohibition Statute. The Supreme Court held that there was no such taking. *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146 (1919).

Similarly, a War Production Board order prohibited

the consumption, processing, and delivery of pulpwood except upon specific authorization of WPB. The plaintiff in the case was forced to discontinue operations for one year as a consequence. The court held that the plaintiff's losses were not compensable because no "actual taking of some right in the property" of the plaintiff occurred. *St. Regis Paper Company* v. *United States,* 110 C. Cls. 271, 276, 76 F. Supp. 831, 834 (1948), certiorari denied, 335 U. S. 815. In this case the court quoted, *inter alia,* from *Royal Holland Lloyd* v. *United States,* 73 C. Cls. 722, 732: "It has been repeatedly held that acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are not a 'taking' within the meaning of the constitutional provision (citing cases). In order to come within the constitutional provision, there must be shown to have been an exercise, by the United States, of a proprietary right, for a greater or less time, in the property taken. * * *" The court went on to say (110 C. Cls. at pp. 276-277, 76 F. Supp. at p. 834):

> The plaintiff asserts that the action taken by the defendant had exactly the same effect and resulted in the same losses that would have occurred had the property been actually taken by the defendant. This may be true, but the fact remains that the property was left in the hands of the plaintiff and the facts do not bring it within the rules laid down by the courts in construing the Fifth Amendment in such a way as to permit a recovery of such damages in this court.

Similar holdings are to be found in cases dealing with various regulation situations. See *P. Dougherty Co.* v.

United States, 113 C. Cls. 448, 459, 83 F. Supp. 688, 690-691 (1949), certiorari denied, 338 U. S. 858; *Green* v. *Gallup,* 46 N. Mex. 71, 75, 120 P. 2d 619, 621 (1941); *Eggebeen* v. *Sonnenburg,* 239 Wis. 213, 219, 1 N. W. 2d 84, 87 (1941); *Gambrell* v. *Chalk Hill Theatre Co.,* 205 S. W. 2d 126, 130 (Tex. Civ. App. 1947); *Baltimore* v. *Bregenzer,* 125 Md. 78, 84-85, 93 Atl. 425, 426-427 (1915).[2]

It has recently been held that legislation, treaties, and a Presidential proclamation prohibiting the hunting of wild geese in an area where the plaintiffs' farm was located, did not constitute an unlawful taking of the plaintiffs' property, even though the value thereof may have been reduced. *Bishop* v. *United States,* 130 C.Cls. —, 126 F.Supp. 449, 452 (1954), certiorari denied, 349 U.S. 955, the Court stating, *inter alia:*

> The mere fact that plaintiffs' property was damaged as a result of the issuance of this proclamation is not sufficient to show a taking. Many governmental actions often affect a person's business or

[2] It is also well settled that a valid exercise of a regulatory power is not compensable even if it causes damages to a property owner; or even if it deprives the owner of the only use to which the property can be profitably put; or even if the purpose of the regulation could have been accomplished by an eminent domain taking. *Murphy* v. *California,* 225 U.S. 623, 629 (1912); *Laurel Hill Cemetery* v. *San Francisco,* 216 U.S. 358, 364-366 (1910); *Powell* v. *Pennsylvania,* 127 U.S. 678, 682 (1888). Appellant challenges the laws and regulations concerning gold arguing, *inter alia,* "Neither gold mining nor its product is an evil" (Br. 38) and that regulation is improper. But the plaintiffs in error in the above-cited case contended that their particular activities, which were regulated, were "in no way harmful" (216 U.S. at p. 364), were "not necessarily harmful to the public welfare" (225 U.S. at p. 625), and, indeed, that the regulated subject was "wholesome and nutritious" (127 U.S. at p. 682). The regulation was in each case held to be valid and compensation was not allowed. As a practical matter, there is hardly any regulatory action which does not have an adverse effect on at least some of the parties subject to it.

property either favorably or adversely. For example, when the prohibition amendment was adopted distilleries were put out of business, but it was held in Hamilton v. Kentucky Distilleries, 251 U.S. 146, 40 S. Ct. 106, 64 L.Ed. 194, that the Government was not liable. When rent controls were put into effect, property owners' income was seriously affected, but it was held in Bowles v. Willingham, 321 U.S. 503, 64 S. Ct. 641, 88 L.Ed. 892, that the Government was not liable. Many other instances readily come to mind. See e.g., St. Regis Paper Co. v. United States, 110 C.Cls. 271, 76 F. Supp. 831; Ora Fina Consolidated Mines v. United States, 92 F. Supp. 1016, 118 C.Cls. 18, certiorari denied 341 U.S. 948, 71 S. Ct. 1015, L. Ed. 1371. [3]

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[3] In the *Oro Fino* case and a later case (*Alaska-Pacific Cons. Mining Co.* v. *United States,* 120 C.Cls. 307 (1951)), the Court of Claims held that a War Production Board order closing the plaintiffs' mines did not result in the taking of plaintiffs' property for public use, for which the Government would be liable under the Fifth Amendment, and that the plaintiffs' petitions did not set forth a cause of action. Following these cases, three similar cases (*Idaho Maryland Mines Corp.* v. *United States,* 122 C.Cls. 670 (1952); *Homestake Mining Co.* v. *United States,* 122 C.Cls. 690 (1952); *Central Eureka Mining Co.* v. *United States,* 122 C.Cls. 691 (1952)) were filed in which the plaintiffs made allegations somewhat more specific than the general ones which were made before the Court of Claims in the preceding cases. In the three later cases, the Court of Claims overruled demurrers and concluded that a trial on the merits was warranted. Motions to vacate the prior decisions in their cases were filed by the plaintiffs in the *Oro Fino* and *Alaska-Pacific* cases. Over opposition, and without recognizing a request for oral argument, the Court of Claims granted those motions. A trial on the merits in these several cases, all of which allege a "taking" as a result of the War Production Board order there involved, has been held and the cases [Nos. 49468, 49486, 49693, 50182, 50195 and 50214] are pending decision in the Court of Claims.

It is to be noted that in concluding that the plaintiffs in the above-discussed group of cases were entitled to a trial on the

> Defendant has not invaded plaintiffs' property, it has asserted no proprietary right in it. The gist of the whole matter is that Congress has passed an Act, valid under the Constitution * * *.

Another example of the distinction between regulatory action and the exercise of eminent domain appears in *Ainsworth* v. *Bar Ballroom Company,* 157 F.2d 97 (C.A. 4, 1946), where an Army-Navy order had declared a property owner's dance hall "off limits" to military personnel. A preliminary injunction enjoining enforcement by the military of the order was reversed and in its opinion the court made the following significant statement (157 F.2d at p. 100):

> If the order was within the discretionary authority of the heads of the War and Navy Departments, duly delegated to appellants, the consequential damage which followed the making and enforcing of the order clearly would not create a justiciable controversy. This is so, even if it be conceded there was an abuse of discretion. * * *

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merits, the Court of Claims took occasion expressly to state (122 C.Cls. at p. 689):

> The establishment at a trial on the merits of proof of facts by plaintiff to rebut the presumption that the particular exertion of the Government's war powers represented by L-208 was justified, *is a most difficult burden,* and it may well be that even then, as in such cases as *Hamilton* v. *Kentucky Distilleries Co.,* 251 U.S. 146, *Perrin* v. *United States,* 232 U.S. 478, and *United States* v. *Doremus,* 249 U.S. 86, defendant will come forward with sufficient facts to justify Order L-208 as a proper regulation * * * [Emphasis added.]

From the above it is readily apparent that the appellant's heavy reliance upon the *Homestake Mining Co.* case (Br. p. 37), as though it were a fully adjudicated case, is misplaced.

In this connection see Note (1950) 19 Geo. Wash. L. Rev. 184, 186-200, which contains an analysis of the distinction voiced by the courts between "regulations" and "takings". There, four elements which must be present to impose liability for a compensable taking as a result of governmental action are listed. These are (*Ibid.,* pp. 193-194, 200):

> (1) "* * * the governmental action which interferes with the use of the property must affect only an individual or a limited group as distinguished from governmental action affecting the public generally or some large segment thereof."
>
> (2) "* * * the interference with the property must be intentional in the sense that the act causing the interference was intentional, and the interference, a natural and probable consequence of the action."
>
> (3) "* * * it would seem necessary that there be a substantial interference with the owner's use of his property."
>
> (4) "* * * it would seem necessary that the substantial interference resulting from the intentional action of the government should be in the form of some positive invasion of the property, rather than an exercise of a purely negative power to prevent the owner from using the property in certain ways."

Commenting on these four elements of a compensable taking, the Note says (*Ibid.,* p. 194):

> Of those four requirements, the first three may also be present in cases of regulation. The fourth requirement, it is believed, is the one which is pres-

> ent in cases of taking but not in cases of regulation. In other words, in regulation, the government merely sets limits to the ways in which the owner may use his property, without itself affirmatively encroaching upon the property, while in a taking, the interference with the owner's use of the property is caused by affirmative invasion of the property as a consequence of the government's acts.

In the instant case not even the first requirement is met, i.e., that the governmental action must affect only an individual or a limited group, since the acts and regulations complained of apply generally. The fact that appellant is more seriously affected by the governmental action than are others generally, is purely incidental. It is at least doubtful that requirement number two (intentional interference) has been met, since the laws and regulations here challenged were primarily concerned with monetary and banking regulation and the protection of the foreign commerce of the United States.[4]

The third and fourth requirements may appropriately be discussed together. The third calls for "substantial interference" with the owner's use of his property and the fourth is that such "substantial interference" must be in the form of some "positive invasion" of the property. Here the owner was not told that she

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[4] Even the appellant does not allege that there was "an intentional appropriation of the property to the public use." *Vansant* v. *United States*, 75 C.Cls. 562, 566 (1932); *P. Dougherty Co.* v. *United States*, 113 C. Cls. 448, 459, 83 F. Supp. 688, 691 (1949), certiorari denied 338 U.S. 858. The Supreme Court stated long ago that "There can be no recovery under the Tucker Act if the intention to take is lacking." *Mitchell* v. *United States*, 267 U.S. 341, 345 (1925).

could not use her property for purposes of gold mining and is not now restricted from doing so. The Government took no action which affirmatively encroached on her property or any use appellant chooses to make of it. It simply controlled the price and the market of this particular product. And even if it could properly be contended that the challenged laws and regulations constituted "substantial interference" with the appellant's use of her property, clearly, the fourth requirement was not present in the instant case, because, in the words of the Note, "the governmental action did not take the form of an affirmative encroachment upon the property, but rather, merely set limits to the way in which the owners might deal with it." *Ibid.,* p. 196.

It follows that the laws and regulations here involved would not give rise to a claim for just compensation even if the validity of the laws and regulations was still an open question and they were determined to be invalid.

None of the cases cited by appellant supports her argument that there has been a taking of property here. The furthest removed from the present case are *United States* v. *General Motors Corp.,* 323 U.S. 373 (1945), Br. 30, and *Kimball Laundry Co.* v. *United States,* 338 U.S. 1 (1949), Br. 30, where condemnation proceedings were brought to acquire temporary use of certain real property. Equally irrelevant are the flooding cases, *United States* v. *Dickinson,* 331 U.S. 745 (1947), Br. 30, 39; *United States* v. *Welch,* 217 U.S. 333 (1910), Br. 30, and *United States* v. *Lynah,* 188 U.S. 445 (1903), Br. 40, where the question was whether a particular invasion by flooding was authorized by the federal navigation power. So also the air-space cases, *Richards* v.

Washington Terminal Co., 233 U.S. 546 (1914), Br. 30; *Portsmouth Co.* v. *United States,* 250 U.S. 1 (1919), *Peabody* v. *United States,* 231 U.S. 530 (1913); *Portsmouth Co.* v. *United States,* 260 U.S. 327 (1922), Br. 40, and *United States* v. *Causby,* 328 U.S. 256 (1952), Br. 40, simply decided whether or not particular actions above the ground constituted invasions of the landowners' properties. *Youngstown Co.* v. *Sawyer,* 343 U.S. 579 (1952), involving an injunction against seizure of the steel industry obviously does not tend to support appellant's claim for damages.

In *Edward P. Stahel & Co.* v. *United States,* 111 C.Cls. 682 (1948), certiorari denied, 336 U.S. 951, cited Br. 32, the United States ordered the plaintiffs to sell their silk, upon request, to those who would use it for purposes of the Government, or to the Government itself, and prohibited any other delivery or use of the silk without specific permission. The Court concluded that the Government had decided "that all the raw silk in the country was needed for public use * * *" (111 C.Cls. at p. 742), and that the taking of the silk was accomplished by the orders respecting delivery and use issued by the Government to the owners, at least as to silk in fact physically delivered to the Government. In *Penna. Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), also relied upon by the appellant (Br. 11, 28-29), the statute prohibited the mining of coal in a manner which was there admitted to destroy previously existing rights of property and contract (260 U.S. at pp. 412-413). In the instant case the challenged laws and regulations do not prohibit the appellant from mining her ore. Indeed, she is at liberty to do so.[5] Any effect upon her is

[5] Thus, appellant's rhetorical question "If the steel companies can get their property back from the executive department, why

indirect and consequential as indicated by her allegation that she finds that she cannot operate her mine at a profit (Br. 20, 35-36). But "Frustration and appropriation are essentially different things." *Omnia Co.* v. *United States,* 261 U.S. 502, 513 (1923); *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 281-283 (1943), and the authorities there cited.

As the Supreme Court stated in the *Legal Tender Cases,* 12 Wall. 457, 551 (1870) [which appellant criticizes along with the later *Gold Clause Decisions* (Br. 55-64)] with respect to a similar argument that acts were prohibited by the Fifth Amendment:

> That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? * * *

III

The Validity and Constitutionality of the Challenged Laws and Regulations Have Long Since Been Determined

Since, at least 1917, Congress has enacted various pieces of legislation to control gold and empowered the

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can't Mrs. Laycock 'get her property back' so that she can make use of it at a profit?", is easily answered. Her property has never been taken.

President to issue Executive Orders concerning the valuation of gold and acquisition and hording of it. Appellant alleges that these acts, proclamations, Executive Orders and regulations were invalid and unconstitutional. But the validity and constitutionality of these laws have been upheld and are no longer open questions.

The constitutionality of the various measures with respect to gold was first treated in the "Gold Clause Decisions," one of which was *Perry* v. *United States,* 294 U.S. 330 (1935). After expressly referring to the Acts of March 9, 1933, 48 Stat. 1, and January 30, 1934, 48 Stat. 337, and Executive Orders and Regulations of the Secretary of the Treasury (294 U.S. at pp. 355-356)—which are challenged by the appellant in the instant case (R. 3-10; Br. 3-8, 46)—the Supreme Court held that Congress was entitled to take the challenged action by virtue of its authority to deal with gold as a medium of exchange. It is enough to say of appellant's lengthy argument (Br. 55-64) that the Supreme Court erred in the *Perry* and subsequent cases (as well as earlier decisions such as *the Legal Tender Cases*), that while appellant might appropriately try to convince the Supreme Court that it had so frequently committed and "perpetuated" so many "obvious errors" (Br. 55), until such decisions are overturned by the Supreme Court, this Court is bound by them. *Bakewell* v. *United States,* 110 F.2d 564 (C.A. 8, 1940), certiorari denied, 310 U.S. 638.

The constitutionality of the Gold Reserve Act of 1934 (48 Stat. 337) was upheld in the face of a contention that it contained an unconstitutional delegation of legislative power by Congress to the President and Secretary of the Treasury. *Uebersee Finanz-Korporation,*

etc. v. *Rosen,* 83 F. 2d 225 (C.A. 2, 1936), certiorari denied, 298 U.S. 679. Cf. Br. 33-36. In *Campbell* v. *Chase Nat. Bank of City of New York,* 5 F. Supp. 156 (S.D. N.Y. 1933), affirmed on jurisdictional grounds, 71 F. 2d 669 (C.A. 2, 1934), certiorari denied, 293 U.S. 592, a case relied upon by the appellant (Br. 70), it was held that under the Trading With the Enemy Act, as amended March 9, 1933, as an incident of its constitutional power to coin money, regulate its value and borrow on the credit of the United States, Congress had the power to legislate regarding gold bullion held by persons within the United States and to treat gold bullion as affected with public interest. This case also rejected a contention that there had been an unconstitutional delegation of legislative power to the executive (5 F. Supp. at pp. 172-173). The Court further considered and rejected the argument that gold bullion could only be regulated as a commodity and not a potential source of money or credit. 5 F. Supp. at p. 168. Cf. Br. 23 where the appellant in the instant case states "In the complaint we are talking about gold as a commodity (private property) and not as money. * * * "

Executive Order 6260, as amended, 12 U.S.C. following sec. 95(a), challenged by the appellant (Br. 5-6, 13, 46, *et seq.*), which prohibits the acquisition or possession of gold bullion, except upon license from the Treasury Department, has been upheld by this and other courts as presently in existence and authorized by the Trading With the Enemy Act, as amended, 12 U.S.C. sec. 95(a), in several criminal cases brought under that Order.[6] See *Ruffino* v. *United States,* 114 F. 2d 696

[6] The challenged Gold Reserve Act and "Gold Regulations" have also been upheld in a criminal proceeding. *United States* v. *Barrios,* 124 F. Supp. 807, 808 (S.D. N.Y. 1952).

(C.A. 9, 1940); *Farber* v. *United States,* 114 F. 2d 5 (C.A. 9, 1940), certiorari denied, 311 U.S. 706; *United States* v. *Levy,* 137 F. 2d 778 (C.A. 2, 1943); *United States* v. *Chabot,* 193 F. 2d 287 (C.A. 2, 1951). Executive Order 6260, as well as the Banking Emergency Act of March 9, 1933, 48 Stat. 1, 12 U.S.C. sec. 95(a), which amended the Trading With the Enemy Act of October 6, 1917, 40 Stat. 415, and the Gold Reserve Act of 1934, 48 Stat. 337, 12 U.S.C. sec. 213, were all upheld in *United States* v. *71.41 Ounces Gold Filled Scrap,* 94 F. 2d 17, 18-19 (C.A. 2, 1938). Executive Order 6260 has not only been upheld as applicable to all gold held within the United States by these decisions, it was also expressly ratified by Section 13 of the Gold Reserve Act of 1934, 48 Stat. 337, 343, 12 U.S.C. sec. 213.[7]

Appellant's contention that she is entitled to just compensation as for a taking under the Fifth Amend-

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[7] The constitutionality of the Trading With the Enemy Act, as amended, 12 U.S.C. sec. 95(a), and Executive Orders issued thereunder, particularly Executive Order 6260, came under attack in the same district in which the instant case arose in the cases of *United States* v. *Stephen Gilbert Crippen, et al.* (D. Ore. No. C-17892) and *United States* v. *Wilbur M. Walls,* (D. Ore. No. C-17900). The defendants were there charged with acquiring and possessing gold bullion without first having obtained a license for that purpose from the Secretary of the Treasury. They moved for a dismissal of the charge, stating that the Trading With the Enemy Act was unconstitutional as an unlawful delegation of legislative powers to the executive, and that it denied the right of an individual to own private property. Executive Order 6260 was declared by those defendants to be unconstitutional in that it exceeded the powers granted by the statute, that it deprived persons of property without due process of law, and that it abolished lawful money. Denying the defendant's motion to dismiss, Judge McColloch held in an unreported memorandum opinion that there was no doubt of the power of the Government, as part of its monetary program, to forbid the possession of gold bullion except upon license (Appendix, *infra,* pp. 35-36).

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ment has also been expressly dealt with—and rejected—by the courts. In *Alaska Juneau Gold Mining Co.* v. *United States,* 94 C. Cls. 15 (1941), it was contended that newly-mined gold melted into gold bars was not coin, currency or monetary gold and had no relation to the monetary system of the United States.[8] The court held that such newly-mined gold was covered by the Act of March 9, 1933, 48 Stat. 1, and the regulations issued thereunder, and that Congress had the power to appropriate and regulate such gold bullion. There, the plaintiff had sought to recover the fair market value of its gold. The court held (94 C. Cls. at p. 40) that the plaintiff was "not entitled to recover any amount as just compensation as for a taking of private property under the Fifth Amendment to the Constitution in excess of the amount paid by the defendant for the gold in question"—which was the official mint price for gold.[9]

See also *Bakewell* v. *United States,* 28 F. Supp. 504, 506 (E.D. Mo. 1939), affirmed 110 F. 2d 564 (C.A. 8,

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[8] Cf. Br. 67 where appellant states "there is no authority for arbitrary pricing of newly mined gold, or for that matter gold in any form" and "there is no authority contained therein giving the Secretary of the Treasury and/or the President power to set a fixed and mandatory price for newly mined gold."

[9] The court went on to indicate that even if it could have been said that the Treasury regulations were doubtful, Congress expressly approved, ratified, and confirmed "All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made or issued by the President of the United States or the Secretary of the Treasury" under the various Acts governing this matter. 94 C. Cls. at pp. 41-42; Act of Jan. 30, 1934, 48 Stat. 337, 343, 12 U.S.C. sec. 213. It is to be noted that Executive Order 6260, which appellant challenges (Br. 5-6, 13, 46, *et seq.*), and its amendatory Executive Orders [No. 6556, Jan. 12, 1934; No. 6560, Jan. 15, 1934], were all issued prior to the enactment of the Act of Jan. 30, 1934, *supra,* and so were expressly approved, ratified, and confirmed by the Congress. This Court has so held. *Ruffino* v. *United States,* 114 F. 2d 696, 697 (1940).

1940), certiorari denied, 310 U.S. 638, which characterizes the legislative restrictions on the use of gold and the executive actions taken thereunder as

> the restrictions on the use of gold *which the Congress had the power to impose* and which were *validly imposed* by the monetary legislation enacted by it during 1933 and 1934 and by *executive action validly taken* pursuant thereto * * * . [Emphasis added.]

Moreover, appellant's constitutionality argument is fallacious on its face. Thus she argues (Br. 67), following a quotation from the Gold Reserve Act: "Note that the language uses the terms 'regulations' and 'conditions' but not 'licenses' * * *." Appellant then quotes from Executive Order 6260 of August 28, 1933 (12 U. S. C. following sec. 95(a), Appendix *infra,* pp. 31-32) and concludes (Br. 68):

> We question the legal right of the President to authorize licensing by the Treasury when the authority was not given in the enabling legislation. Further, subsequent approval by Congress of the Presidential Act, to our mind, cannot make something out of nothing. If there was no authority in the first place, then the attempted Executive legislation is ineffective. Therefore, it would seem that in order to achieve valid legislation, Congress would have to re-enact the Executive legislation. * * *

But, even if the omission of the word "licenses" would have been significant, the fact is, as shown by the excerpt quoted in appellant's own brief (p. 67), that in the Act of March 9, 1933 (48 Stat. 1), Congress ex-

pressly provided that the President could accomplish the purposes of the Act "through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, *licenses,* or otherwise—" [Italics added.] [10] Moreover, the dates show that this express congressional authority was prior authorization rather than "subsequent approval" as appellant would have it appear. Further, Congress did later take occasion to approve, ratify, and confirm "All actions, regulations, rules, orders, and proclamations heretofore taken, promulgated, made, or issued by the President of the United States or the Secretary of the Treasury" under its previously enacted laws which related, *inter alia,* to the regulation of gold. Act of January 30, 1934, c. 6, sec. 13, 48 Stat. 337, 343, 12 U. S. C. sec. 213, 31 U. S. C. sec. 824. And there can, of course, be Congressional ratification of Executive action. *Brooks* v. *Dewar,* 313 U. S. 354 (1941).

The argument which appellant advances here, including her reliance (Br. 68-70) on the decisions in *United States* v. *Driscoll,* 9 F. Supp. 454 (D. Mass. 1935), and *Campbell* v. *Chase Nat. Bank of City of New York,* 5 F. Supp. 156 (S. D. N. Y. 1933), affirmed on jurisdictional ground, 71 F. 2d 669 (C. A. 2, 1934), certiorari denied, 293 U. S. 592, was considered and rejected by the United States Court of Appeals for the Second Circuit in *United States* v. *Levy,* 137 F. 2d 778 (1943).

Appellant's contention (summarized at Br. 13) that

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[10] See also the statement by the Supreme Court with reference both to the Act of March 9, 1933, 48 Stat. 1, and the Gold Reserve Act of January 30, 1934, 48 Stat. 337, "Such dealings [in gold coin] could be had only for limited purposes and under *license.*" [Italics supplied.] *Perry* v. *United States,* 294 U.S. at p. 356.

the Trading with the Enemy Act is applicable only "during time of war," is completely without merit. As shown by the excerpt quoted in appellant's own brief (pp. 5, 67), that Act is expressly applicable not only during time of war but also "during any other period of national emergency declared by the President" (48 Stat. 1, 12 U. S. C. sec. 95(a)).[11] By Proclamation 2914 of December 16, 1950, 15 F. R. 9029 (*supra,* p. 2), the President declared the existence of a national emergency and this condition is still in existence.[12]

Moreover, such "during time of war" argument and the related argument that appellant is not an "enemy" (Br. 36), overlooks the fact that the Act of March 9, 1933, 48 Stat. 1, which amended the Trading With the

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[11] This twice quoted excerpt also demonstrates the want of merit in appellant's effort to make something of the fact that silver is found with gold (Br. 32). Congress was obviously aware of that fact. As the excerpt shows (Br. 5, 67), in the Act of March 9, 1933, 48 Stat. 1, 12 U.S.C. sec. 95(a), Congress specifically included silver as well as gold. Gold and silver were similarly coupled by the Congress in the Act of August 27, 1935, Ch. 780, Sec. 2, 49 Stat. 938, 939, 31 U.S.C. sec. 773(b) (see *infra,* p. 28). And, just as the appellant still has her gold mine and her gold-bearing ore, she still has such silver as is contained therein. None of it has been taken from her. Contrary to her assertion (Br. 32), she is free to process her mineral-bearing ore at any time it pleases her to do so.

[12] Prior declarations of the existence of national emergencies are Proclamation 2039 of March 16, 1933; Proclamation 2352 of September 8, 1939, 4 F.R. 3851; and Proclamation 2487 of May 27, 1941, 55 Stat. 1647. The last of those emergencies did not terminate until April 28, 1952. Proclamation 2974 of April 28, 1952, 66 Stat. C31, C32; *American Houses* v. *Schneider,* 211 F. 2d 881, 884 (C.A. 3, 1954). By that time, Proclamation 2914 of December 16, 1950, 15 F.R. 9029, had long since been issued. Thus for over 20 years there has been a national emergency. It is also to be noted that the authority delegated to the President and the Secretary of the Treasury under the Gold Reserve Act of 1934 was not restricted to time of war or national emergency. 48 Stat. 337, 343, 12 U.S.C. sec. 213.

Enemy Act of 1917, was " 'An Act to provide relief in the existing national emergency in banking, and for other purposes.' 48 Stat. 1." *Farber* v. *United States,* 114 F. 2d 5, 7 (C. A. 9, 1940) certiorari denied, 311 U. S. 706. The Act is in fact known and referred to as the "Emergency Banking Relief Act of 1933." E. g., *United States* v. *Levy,* 137 F. 2d 778 (C. A. 2, 1943). Thus, the Trading With the Enemy Act, as amended by the 1933 Act [and it is clear that it is the Act as amended by the 1933 Act, 48 Stat. 1, which appellant attacks (Br. 5, 67)] is not, as appellant would have it appear (Br. 36) merely "designed to prevent gold, among other properties, from reaching and benefitting the *enemy during time of war.*" [Italics as in appellant's brief.] And, since there was express congressional authority for the Executive action in the instant case, the case of *Little* v. *Berreme (The Flying Fish),* 2 Cranch 170 (1804), cited by the appellant (Br. 36), is not in point.

We submit, therefore, that all of appellant's attacks upon the statute and regulations relating to gold have long since been conclusively rejected.

IV

The Action Is Barred by the Statute of Limitations

Appellant complains that certain statutes enacted by the Congress in 1917, 1933 and 1934 and certain Executive Orders and administrative regulations issued pursuant to those statutes are invalid and unconstitutional (R. 5-10). Appellant further complains that these allegedly invalid statutes, Executive Orders and regulations prevented her from making lawful use of her property, directly interfered with her right to own and enjoy the use of private property, and deprived her of

her property without due process of law and without just compensation (R. 6-10).

However, 28 U.S.C. sec. 2401(a), *supra,* p. 2, provides, *inter alia:*

> Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action accrues.

The face of the complaint shows that the statutes complained of—the Gold Reserve Act of 1934 and the Trading With the Enemy Act, as amended in 1933—were passed by the Congress over 20 years prior to the filing of this action. Any taking of the appellant's property, or any deprivation of her use and enjoyment of it, occurred when these allegedly unlawful statutes were enacted and when the allegedly unlawful Executive Orders and regulations were made pursuant thereto. But there have been no changes in the official price paid for gold or in the regulations relating to the acquisition or sale of gold within the six-year period preceding the filing of this action.

In this respect also, appellant tends to defeat her own claim. As before (see *supra,* p. 6), appellant is confusing alleged tort with alleged taking. Thus, she argues (Br. 18): "The wrongs of the Government are continuous and being continuous she has the Constitutional right to challenge a portion thereof and waive the balance."[13] But if there were a taking in the instant case, it occurred when the Acts and regulations complained of were first adopted and appellant would not "continuously" since that time have had her property to be taken "every hour of every day" (Br. 18, 19).

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[13] As noted previously (fn. 1, p. 6, *supra*), the appellant has not invoked the Federal Tort Claims Act, 62 Stat. 933, 28 U.S.C. sec. 1346(b), (R. 3; Br. 14-18).

Appellant confuses the taking of a property right and the exercise of the right taken. Thus, in *United States* v. *Causby,* 328 U.S. 256 (1952), an easement of flight was taken which was exercised whenever a plane took off or landed. Any "taking" here of a property right could only have occurred when the statutes were passed or the regulations issued.

V

The Complaint Fails to Allege Facts Sufficient to Establish Jurisdiction Over the United States

"Consent alone gives jurisdiction to adjudge against a sovereign." *United States* v. *U. S. Fidelity Co.,* 309 U.S. 506, 514 (1940). The United States has consented to suit against it in some circumstances. The appellant alleges (R. 3) that 28 U.S.C. sec. 1346 constitutes a waiver of sovereign immunity by the United States in an action such as is described in the balance of her complaint. She further asserts that her claim is founded "upon the Constitution, Acts of Congress, regulation of executive departments and upon implied contract with the United States * * * " (R. 3). Yet at no point in the balance of her complaint is there described any implied or express contract between the United States and the appellant.[14] There are, however, references to the Trading With the Enemy Act, the Gold Reserve Act of 1934, and the various proclamations and Executive Orders issued pursuant thereto. It must be assumed, therefore, that appellant bases her cause of action upon

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[14] As shown in Point II, *supra,* pp. 7-17, this case does not present "an actual physical taking of an ascertainable thing of value * * * converted to a public use" (R. 13), such as is required by the authorities to constitute an implied contract which requires the payment of just compensation.

those statutes and various orders concerning the regulation of gold and the establishment of its value.

But even if those acts constituted jurisdictional grants, it is clear that consent to sue the United States, once given, may be withdrawn by Congress. *Maricopa County* v. *Valley Bank,* 318 U.S. 357, 362 (1943), stating "the power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations." Thus, the Congress, by specific enactment, may limit certain general consent statutes, such as 28 U.S.C. sec. 1346, by expressly withdrawing consent in certain types of cases. Congress has done just that so far as the present action is concerned. By the Act of August 27, 1935, Ch. 780, sec. 2, 49 Stat. 938, 939, 31 U.S.C. sec. 773(b), *supra,* p. 2 Congress provided, in pertinent part, as follows:

> Any consent which the United States may have given to the assertion against it of any right, privilege, or power whether by way of suit, counterclaim, set-off, recoupment, or other affirmative action * * * in any proceeding of any nature whatsoever * * * (3) upon any claim or demand arising out of any surrender, requisition, seizure, or acquisition * * * of any gold or silver and involving the effect or validity of any change in the metallic content of the dollar or other regulation of the value of money, is withdrawn * * *.

It follows that although appellant contends that her action is authorized expressly by 28 U.S.C. sec. 1346(a)(2), the Congress did not intend to grant—and has withdrawn—any consent in the type of action she is bringing, and, therefore, the Court has not acquired jurisdiction over the United States in this case.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the District Court should be affirmed.

Respectfully,

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Portland, Oregon.
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DECEMBER, 1955.

APPENDIX

The challenged provision of the Gold Reserve Act of 1934, 48 Stat. 337, 340, states as follows:

> Sec. 3. The Secretary of the Treasury shall, by regulations issued hereunder, with the approval of the President, prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and, (c) for such other purposes as in his judgment are not inconsistent with the purposes of this Act. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account (except on behalf of the United States) only to the extent permitted by, and subject to the conditions prescribed in, or pursuant to, such regulations. Such regulations may exempt from the provisions of this section, in whole or in part, gold situated in the Philippine Islands or other places beyond the limits of the continental United States.

The challenged provision of the Trading With the Enemy Act, as amended by the Emergency Banking Relief Act of March 9, 1933, 48 Stat. 1, 12 U. S. C. sec. 95(a), states as follows:

> (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

* * * * *

The challenged parts of Executive Order No. 6260, as amended, 12 U. S. C. following sec. 95(a), state as follows:

Sec. 4. Acquisition of Gold Coin and Gold Bullion.—No person other than a Federal Reserve bank shall after the date of this order acquire in the United States any gold coin, gold bullion, or gold certificates except under license therefor issued pursuant to this Executive order * * * Licenses issued pursuant to this section shall authorize the holder to acquire gold coin and gold bullion only from the sources specified by the Secretary of the Treasury in regulations issued hereunder. [As amended by Ex. Ord. No. 6556, promulgated January 12, 1934.]

Sec. 5. Holding of gold coin, gold bullion, and gold certificates.—After 30 days from the date of this order no person shall hold in his possession or retain any interest, legal or equitable, in any gold coin, gold bullion, or gold certificates situated in the United States and owned by any person subject to the jurisdiction of the United States, except under license therefor issued pursuant to this Executive order; provided, however, that licenses shall not be required in order to hold in possession or retain an

interest in gold coin, gold bullion, or gold certificates with respect to which a return need not be filed under section 3 hereof.

* * * * *

Sec. 6. Earmarking and export of gold coin and gold bullion.—After the date of this order no person shall earmark or export any gold coin, gold bullion, or gold certificates from the United States, except under license therefor issued by the Secretary of the Treasury pursuant to the provisions of this order.

* * * * *

Sec. 9. The Secretary of the Treasury is hereby authorized and empowered to issue such regulations as he may deem necessary to carry out the purposes of this order. * * *

Sec. 10. Whoever wilfully violates any provision of this Executive order or of any license, order, rule, or regulation issued or prescribed hereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than 10 years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

The challenged parts of the United States Treasury Gold Regulations, 31 C. F. R. Part 54, as amended, 19 F.R. 4309-4316, state as follows:

Sec. 54.11 *Civil and criminal penalties*—(a) *Civil penalties.* Attention is directed to section 4 of the Gold Reserve Act of 1934, which provides:

Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or

held in custody, in violation of this Act or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of this Act or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred (31 U.S.C. 443).

(b) *Criminal punishment.* Attention is also directed to (1) section 5 (b) of the act of October 6, 1917, as amended, which provides in part:

Whoever wilfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000 or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both. As used in this subdivision the term "person" means an individual, partnership, association, or corporation (12 U.S.C. 95a (3). [19 F.R. at pp. 4311-4312.]

* * * * *

Sec. 54.12 *Conditions under which gold may be acquired, held, melted, etc.* Gold in any form may be acquired, held, transported, melted, or treated, imported, exported, or earmarked only to the extent permitted by and subject to the conditions pre-

scribed in the regulations in this part or licenses issued thereunder [19 F.R. at p. 4312.]

* * * * *

Sec. 54.44 *Purchase price.* The mints shall pay for all gold purchased by them in accordance with this subpart $35.00 (less one-fourth of 1 percent) per troy ounce of fine gold, but shall retain from such purchase price an amount equal to all mint charges. This price may be changed by the Secretary of the Treasury without notice other than by notice of such change mailed or telegraphed to the mints. [19 F.R. at p. 4316.]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. C-17892

UNITED STATES OF AMERICA, PLAINTIFF,

v.

STEPHEN GILBERT CRIPPEN and WOODROW WILSON ATWOOD, DEFENDANTS

No. C-17900

UNITED STATES OF AMERICA, PLAINTIFF,

v.

WILBUR M. WALLS, DEFENDANT

MEMORANDUM

It seems to me there is no doubt of the power of the Government as part of its monetary program to forbid the possession of gold bullion except upon license. The

question, it would appear, is a political one. See the opinion of Justice Miller in the First Legal Tender Case, and see the Second Legal Tender Case. The question being political, no constitutional question of the usual sort involving right to property or personal liberty arises.

Other questions argued have been considered.

The motions to dismiss are denied.

Dated December 31, 1954.

CLAUDE MCCOLLOCH,
Judge.

n.

Greenbackism, "16 to 1," and other monetary issues have all been fought over in times past as national political issues. Presidential elections have turned on them.

See a late case in the advance sheets. 124 F.Supp. 807.

C. McC.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 367867 684

No. 14860

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MICHAEL GLENN, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, IDA MAE GLENN, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

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In the United States Court of Appeals for the Ninth Circuit

No. 14860

UNITED STATES OF AMERICA, APPELLANT

v.

MICHAEL GLENN, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, IDA MAE GLENN, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This action was brought against the United States under the Federal Tort Claims Act to recover damages for injuries allegedly incurred by the appellee as the result of the negligence of Government medical personnel during and immediately after his birth at a military hospital (R. 3–8). The jurisdiction of the district court was alleged to rest on 28 U. S. C. 1346 (b) (R. 4). On April 19, 1955, the United States District Court for the Southern District of California, Central Division, entered judgment for the appellee

(R. 75–76).[1] On May 24, 1955, the United States filed its notice of appeal (R. 76). The jurisdiction of this Court rests upon 28 U. S. C. 1291.

STATEMENT OF THE CASE

On November 12, 1953, Michael Glenn, appellee here, acting through his mother and guardian, Ida Mae Glenn, instituted this tort action against the Government in the United States District Court for the Southern District of California, Central Division (R. 3–8). The complaint alleged the following:

Plaintiff was born in the United States Naval Air Station Hospital at Seattle, Washington, on December 5, 1949 (R. 4). Previously, the Government, together with its employees at the hospital, had undertaken the prospective delivery of the child and, pursuant to that undertaking, said employees attended the child's birth (R. 4–5).[2] The complaint went on to allege negligence on the part of the Government personnel in prematurely and carelessly using clamps and forceps during the delivery of the child and dropping him to the floor immediately after birth (R. 5–8). As a consequence of these alleged actions, the complaint stated that plaintiff was injured in that he sustained "numerous bruises, abrasions, contusions, and lacerations over and about his head and body, a cerebral involvement, a spastic involvement, cerebral palsy, Little's disease, together with severe and profound physical and mental shock to his entire nervous sys-

[1] The opinion of that court is reported at 129 F. Supp. 914.

[2] Mrs. Glenn was the wife of a member of the Armed Forces and therefore qualified for care in a Government hospital.

tem," and that impairment of his faculties and his disabilities were of a permanent nature (R. 5–6). As compensation for the aforementioned injuries, the complaint sought $750,000 in general damages plus an amount in special damages, to be computed at the time of trial, which by then might have accrued (R. 8).

On January 18, 1954, the Government moved to dismiss the complaint on the grounds that it failed to state a claim upon which relief could be granted and that, since suit was instituted nearly four years after the alleged claim arose, the action was time barred by the two-year limitation on Tort Claims Act suits contained in 28 U. S. C. 2401 (b) (*infra,* p. 6) (R. 10). By order dated February 23, 1954, this motion was denied (R. 12–13). On February 25, 1954, the Government moved the district court to reconsider its order denying the motion to dismiss, and to dismiss the complaint (R. 14). The district court granted this motion on March 29, 1954, upon the sole ground that the complaint contained no allegation of any wrongful or negligent act on the part of any identified Government employee (R. 15–16). Plaintiff was granted leave to amend within fifteen days so as to remedy that defect (R. 16). On April 9, 1954, the plaintiff filed an amended complaint substantially identical to the original complaint with the added specification that Dr. Walter N. Hanson, Dr. R. F. Kerr, Nurse R. Armstrong, and Nurse C. Curran were the employees of the Government who either dropped the plaintiff or permitted him to fall to the floor thereby causing the alleged injuries (R. 17–23). On May 6, 1954, the Government answered, denying the allega-

tions of the complaint that there was carelessness or negligence upon its part or on the part of its employees during or after delivery, and denying that the plaintiff had been dropped (R. 23–28). The answer also asserted that the claim was barred by 28 U. S. C. 2401 (b) since suit was not instituted within two years after the claim accrued (R. 27).

Subsequent to a pretrial conference, the parties stipulated that the issues for trial were as follows: the alleged negligence of Government medical personnel during and after delivery; whether the child was dropped; whether the alleged negligence caused the injuries complained of; and, the nature, extent and duration of plaintiff's injuries (R. 35–37). Thereafter, an additional stipulation was entered into by the parties and approved by the court, whereby the Government, while still denying negligence or liability on its part, agreed to a partial compromise of the action in order to avoid a lengthy and costly trial on the above issues. (R. 52–57). The stipulation provided that if the court decided that a cause of action was stated in the complaint and that such cause of action was not time barred by 28 U. S. C. 2401 (b), judgment might be entered in favor of the plaintiff for $7,500 (R. 55–56). The stipulation expressly reserved the appellate rights of either party on the limitations question (R. 56).

On April 19, 1955, the district court, pursuant to a memorandum of decision (R. 58–71), entered judgment for the plaintiff (R. 75–76). The court held that this action was not barred by the two-year limitation on Tort Claims Act suits found in 28 U. S. C. 2401 (b),

in view of the minority and consequent legal disability of the plaintiff (R. 74). It ruled that plaintiff was covered by the disability provision contained in 28 U. S. C. 2401 (a) (*infra*, p. 6), which entitles an individual coming within its purview to three years after the cessation of a disability to institute suit (R. 74). The court reasoned that notwithstanding the independent and mutually exclusive statutory derivations of 28 U. S. C. 2401 (a) and 28 U. S. C. 2401 (b), the 1948 revision and codification of those sections in the present Judicial Code made the disability provision of Section 2401 (a) applicable to the limitations period specified in Section 2401 (b) (R. 62–69). Judgment was accordingly entered for the plaintiff in the amount of $7,500 (R. 76).

QUESTION PRESENTED

Whether the disability provision of 28 U. S. C. 2401 (a) is applicable to the time limitations on Tort Claims Act suits contained in 28 U. S. C. 2401 (b).

SPECIFICATION OF ERRORS RELIED UPON

1. The district court erred in not ruling that appellee's tort claim against the United States was time barred by the limitations provisions of 28 U. S. C. 2401 (b).

2. The district court erred in holding that the disability provision of 28 U. S. C. 2401 (a) carries over to the limitations provisions of the Tort Claims Act, as set forth in 28 U. S. C. 2401 (b).

3. The district court erred in entering judgment for the appellee.

370114—55——2

STATUTE INVOLVED

28 U. S. C. 2401 provides as follows:

> Time for commencing action against the United States.
>
> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.
>
> (b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.

SUMMARY OF ARGUMENT

The district court has held that the tort claim at bar, instituted nearly four years after the inception of the asserted cause of action, was not time-barred by the seemingly absolute two-year limitation on Tort

Claims Act suits, now contained in 28 U. S. C. 2401 (b). It reached this result by applying the disability provision of 28 U. S. C. 2401 (a), covering certain non-tort actions against the Government, to the independent time limitation on tort claims found in 28 U. S. C. 2401 (b).

The district court's holding is demonstrably unsound. The structure and content of the two subsections, their statutory derivations, and the relevant Reviser's Notes, conclusively show that the disability provision of 2401 (a) is not applicable to the tort action time limitations of 2401 (b). This inapplicability, moreover, comports with the consistent policy of Congress in other Federal acts conferring jurisdiction to sue in tort, and has been subscribed to by every other decision on this precise question. For these reasons the decision below should be reversed.

ARGUMENT

The Disability Provision of 28 U. S. C. 2401 (a) Does Not Toll the Two-Year Limitation on Tort Claims Act Suits Imposed by 28 U. S. C. 2401 (b)

A. Every Relevant Interpretative Factor Precludes the Applicability of This Disability Provision to 28 U. S. C. 2401 (b)

In reaching its decision, the court below laid overriding emphasis on the structure of 28 U. S. C. 2401 and the general language of the disability provision in 2401 (a). It acknowledged, however, that judicial inquiry did not end with an examination of the bare bones of the statute, and attempted to buttress its conclusion by a consideration of the history of this Code provision. We contend that the structure of this Code provision and its "plain language" (R. 69), consid-

ered in proper context, compel an opposite conclusion. Moreover, we submit, an analysis of the appropriate legislative material further undercuts the decision below.

1. Where revision or codification of existing law is concerned, resort is to be had to the laws, which were the subject of revision, to resolve anything left in doubt by the language or structural scheme used by the revisers, *United States* v. *Lacher,* 134 U. S. 624, 626 (1890); *United States* v. *Hirsch,* 100 U. S. 33, 35 (1879); *The Conqueror,* 166 U. S. 110, 122 (1897); *Barrett* v. *United States,* 169 U. S. 218, 227 (1898); *United States* v. *Grainger,* 346 U. S. 235, 247–248 (1953), rehearing denied, 346 U. S. 843; *Findlay* v. *United States,* 225 Fed. 337, 350 (C. A. 9) (1950); cf. *Northwestern Mut. F. Ass'n.* v. *C. I. R.,* 181 F. 2d 133, 135 (C. A. 9) (1950). Since proper resolution of the issue at bar is not feasible unless 28 U. S. C. 2401 is viewed from the perspective of its chronological development, it is appropriate that we first direct our attention to the statutory antecedents of this contested Code provision.

28 U. S. C. 2401 contains the limitations provisions of two separate statutes. 28 U. S. C. 2401 (a), wherein the disputed disability provision is found, is derived from Section 24 (20) of the Judiciary Act of March 3, 1911, 36 Stat. 1093, which, based on Section 2 of 1887 Tucker Act, 24 Stat. 505, gave the district courts concurrent jurisdiction with the Court of Claims in certain civil actions against the Government not exceeding $10,000 in amount which did not sound in tort. 28 U. S. C. (1946 Ed.) 41 (20). The 1911 Act

set a six-year limitation for institution of such suits but provided that in the event of certain enumerated disabilities the limitations period would be extended until three years after the disability had ceased. 28 U. S. C. (1946 Ed.) 41 (20).[3]

[3] 28 U. S. C. (1946 Ed.) 41 (20) provided as follows in pertinent part:

SUITS AGAINST THE UNITED STATES

The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. The claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

28 U. S. C. 2401 (b), in turn, is derived from Section 420 of the 1946 Federal Tort Claims Act,[4] which set forth the time limitations on tort actions against the United States under that Act, 28 U. S. C. (1946 Ed.) 942.[5] That section set a one-year limit on such actions (subsequently extended to two years by the Act of April 25, 1949, 63 Stat. 62), but made no provision for a tolling of the limitations period by virtue of any disability.[5]

In 1948, with the enactment of the present Judicial Code, 62 Stat. 869, *et seq.*, the provisions of the 1911 Act and the provisions of the Tort Claims Act which authorized the district courts to entertain suits against the United States in their respective categories, were grouped together as subsections of Section 1346 of Title 28, and denominated "United States as defend-

[4] The Federal Tort Claims Act was originally enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842.

[5] 28 U. S. C. (1946 Ed.) 942, provided as follows:

> Every claim against the United States cognizable under this chapter shall be forever barred, unless within one year after such claim accrued or within one year after August 2, 1946, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after August 6, 1946, whichever is later, an action is begun pursuant to subchapter II of this chapter. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to subchapter II of this chapter shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 31 of this title, if it would otherwise expire before the end of such period.

ant." The limitations provisions of these two acts were also grouped together, as subsections of Section 2401 of Title 28, and labeled "Time for commencing action against the United States" (*supra,* p. 6). It was this collocation, together with certain changes in phraseology in the 1948 Code (discussed *infra,* pp. 13–17) upon which the decision of the district court was rested.

Until the decision below, however, suggestions of any interdependence of the disparate limitations of 2401 (a) and (b), by a strained reading of that section, had been emphatically rejected by the courts (*infra,* pp. 24–27). The departure from these decisions, and the intermingling of the two. subsections effected by the court below is, we submit, untenable.

2. We have already seen that Section 24 (20) of the 1911 Act, the precursor of 2401 (a), was enacted long before the Tort Claims Act, from which 2401 (b) was derived, became law. More importantly, the former Act, which expressly excluded tort suits from its purview, contained a disability proviso in its limitations section whereas the limitations section of the latter Act was not so qualified.[6] Palpably, the fact that these two different limitations provisions were grouped together for convenience as different parts of one section of the new Code by the 1948 revision of Title 28 did not manifest Congressional intent that the disability provision of the 1911 Act was to apply to tort claims litigation. Mere separation of portions of former statutes and regrouping them for convenience in code form does not

[6] As will be subsequently shown, this omission from the Tort Claims Act followed a consistent pattern of Congressional action in the area of tort litigation. *Infra*, pp. 20–24.

effect a change in the law. *Buck Stove Co.* v. *Vickers,* 226 U. S. 205, 213 (1912); *Hyde* v. *United States,* 225 U. S. 347, 361 (1912). Nor is the law varied by alterations in phraseology where such alterations are intended merely to restate pre-existing law in different terms or in a simplified form. See *United States* v. *Lacher,* 134 U. S. 624, 626 (1890); *Holmgren* v. *United States,* 217 U. S. 509, 519–520 (1910); *Anderson* v. *Pacific Coast S. S. Co.,* 225 U. S. 187, 199, 202–203 (1912); cf., *United States* v. *Grainger,* 346 U. S. 235, 247–248 (1953). The structure and terms of 28 U. S. C. 2401, and the Reviser's comments on the scope of the 1948 revision show that it is changes of this sort that we are dealing with here.

Twenty-eight U. S. C. 2401, as indicated, follows the pattern set by 28 U. S. C. 1346 in that it collocates parallel provisions of the 1911 Act and Tort Claims Act as separate subsections of a common section with a convenient reference denominator. The pre-existing independence of those provisions is, however, preserved. The exclusiveness of their identities is attested to by numerous factors, not the least of which is the utilization of separate subsections, each dealing with different categories of actions and each setting up different time limitations. This independence is further underscored by the language of 2401 (b), which states baldly, and without any reference to 2401 (a), with its six year time limitation and its three year disability provision, that "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrued * * *" (*supra,* p. 6).

There is nothing in the legislative history of this codification which even suggests that the disability provision of 2401 (a) was designed to apply to 2401 (b). Nor is there any indication of such applicability in the exhaustive Reviser's Notes. Indeed, those Notes emphasize the mutual exclusiveness of the subsections, stating that 2401 (a) relates to the "time limitation for bringing actions against the United States under Section 1346 (a) of this title," which explicitly excludes tort actions, and that "Subsection (b) of the revised section simplifies and restates said section 942 [limiting torts actions against the Government in the former 28 U. S. C.] *without change of substance.*" (Emphasis supplied.) See Report No. 308, House Committee on Judiciary, 80th Cong., 2d Sess., p. A. 185.[7]

Notwithstanding the foregoing, the Court below seized upon the fact that the disability provision of the

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[7] In *The Judicial Code—1948 Revision*, 8 F. R. D. 439, William W. Barron, the Chief Reviser of Title 28, relates (8 F. R. D. at 441):

> There was no purpose on the part of the Revision staff to effect any change in existing law. Despite this, the process of comprehensively examining and rewriting the Code disclosed some grave disparities, inconsistencies and ambiguities not correctable by mere codification. * * * The Reviser and the Advisory Committee, upon discovering situations which would not yield to codification, felt in duty bound to apprise Congress of their findings and recommendations. Consequently a few such changes, substantive in nature, were recommended to Congress. These were carefully outlined in the Reviser's Notes and fully considered by the Judiciary Committees of both houses. * * *

Thereafter, the article goes on to discuss the nature of those substantive changes. No mention is made of any such change effected by 28 U. S. C. 2401.

1911 Act was revised in 2401 (a) of the 1948 codification to open with the phrase "[t]he action of any person under legal disability," and made that the prime basis for according it general applicability. However, apart from the fact that the structure of Section 2401, as well as the language of 2401 (b), belie such applicability, ascertainment of the effect of this language is not restricted solely to a consideration of the face of the statute, no matter how "clear the words may appear on superficial examination." *United States* v. *American Trucking Ass'n.,* 310 U. S. 534, 544 (1940). The appropriate legislative material, where it illuminates the Congressional intent, is also to be considered. *Heikkila* v. *Barber,* 345 U. S. 229, 233 (1953); *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297 (1943); *Helvering* v. *Morgan's, Inc.,* 293 U. S. 121, 126 (1934); *Ozawa* v. *United States,* 260 U. S. 178, 194 (1922). Here, an examination of the language of the provision prior to 1948, in the light of the authoritative Reviser's commentaries on the 1948 version, makes it clear that the prefatory words "any person under legal disability" were not intended to have, and did not have, the overriding effect ascribed to it by the district court. Rather they related, in a revised and simplified form, solely to the preceding sentence of 2401 (a) which set limitations on district court Tucker Act suits.

Under the 1911 Act, the disability provision, as found in Section 24 (20), was phrased in the following language:

> The claims of married women, first accrued during marriage, of persons under the age of

twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. [28 U. S. C. (1946 Ed.) 41 (20)]

The 1948 revision and codification placed the disability provision in 28 U. S. C. 2401 (a) and changed the language to read as follows:

> The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

As to this change of language, the Reviser's Notes following 2401 tell us:

> Words in subsection (a) of this revised section, "person under legal disability or beyond the seas at the time the claim accrues" were substituted for "claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim." (See Reviser's Note under section 2501 of this title.)

The reference to the Reviser's Note following 28 U. S. C. 2501 refers to a disability provision governing Court of Claims actions against the Government under the Tucker Act, which provision is substantially

similar to the one here in controversy.[8] The Reviser's Note following that section states:

> Words "a person under legal disability or beyond the seas at the time the claim first accrues" were substituted for "married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim." The revised language will cover all legal disabilities actually barring suit. For example, the particular reference to married women is archaic and is eliminated by use *of the general language substituted* (emphasis supplied).

From a reading of these excerpts, it must be apparent that "the general language substituted" (*supra*) was not intended to extend the scope of the disability provision beyond those non-tort causes of action previously covered in Section 24 (20) of the 1911 Act and now covered by 28 U. S. C. 1346 (a). Rather, as applied in such Tucker Act suits, it was designed to obviate any necessity of reference to specific disabilities, and to bring the disability provision into tune with what modern law considers to be a disabling legal status, *i. e.,* the change in status of married women.

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[8] 28 U. S. C. 2501 provides as follows in pertinent part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed * * * within six years after such claim first accrues.
>
> * * * A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

If a change in the scope of the disability provision such as was propounded by the court below was intended, it is certainly remarkable that both the committee reports and the Reviser's Notes, although they meticulously chronicle every other change effected by the 1948 codification, make no mention whatsoever of the fact that Congress purportedly intended the disability provision of the 1911 Act to apply to tort actions against the Government, thereby effecting a significant change in the law and also reversing a previously established legislative pattern (see *infra,* pp. 20–24). This becomes even more unusual when one considers the Reviser's statement with regard to 2401 (b), that no substantive change was intended (*supra,* p. 13). Compare *Ex parte Collett,* 337 U. S. 55, 71 (1949).[9]

Moreover, several other aspects of the content and grouping of 28 U. S. C. 2401 are revealing. First, it is significant that the disability provision of 2401 (a) permits a three-year period for commencing actions

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[9] In Barron, *The Judicial Code—1948 Revision,* 8 F. R. D. 439, the Chief Reviser warns (at 445–446):

> Because of the necessity of consolidating, simplifying and clarifying numerous component statutory enactments no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed.
>
> Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.
>
> Congress recognized this rule by including in its reports the complete Reviser's Notes to each section in which are noted all instances where change is intended and the reasons therefor.

after cessation of the disability. This, of course, is three years less than the six-year period for institution of suits allowed by this subsection to persons under no disability. However, this three-year period is *greater* than the two-year period allowed for institution of tort suits by 2401 (b), and indeed when 28 U. S. C. 2401 (b) first became law, only one year was permitted for the institution of tort claims. *Infra,* p. 10. Thus, if the disability provision of 2401 (a) were to be applied to 2401 (b), we would have the anomalous situation of a tort claimant having a longer period of time to institute suit *after* his disability was removed than he would have had there been no disability whatsoever. Such a result would be unique, insofar as we can discover, in the limitations field and indeed flies in the face of the rationale of disability exceptions to statutes of limitation.[10] It assuredly falls short of comporting with the district court's own recognition that "each part [of the Code] must be reasonably interpreted, harmonized, and effectuated in conjunction with the other parts" (R. 67–68). Congress can hardly be presumed to have intended such an incongruous limitations pattern.

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[10] Disability provisions are designed, at most, to permit affected persons to have the same period of time for institution of suits after cessation of the disability as would persons not laboring under such a handicap. In many cases, the time for instituting suits after the lifting of the disability is less than the original statutory period (see *e. g.*, 28 U. S. C. 2401 (a)), and a number of states merely allow several years in addition to the normal period and do not suspend the running of the statute until after the disability ceases. For a treatment of this question, see Blume and George, *Limitations and the Federal Courts*, 49 Mich. L. Rev. 937, 975.

Nor does the relative placement of the subsections of 28 U. S. C. 2401 indicate the creation of such a situation. If the disability provision of 2401 (a) were intended to apply to 2401 (b), the logical method would not have been to place it in 2401 (a) without any reference to tort actions, as was done here, but rather to place it either at the end of 2401 (b) with a reference to both subsections or in a separate subsection following both 2401 (a) and (b). The latter technique was precisely the one followed by Congress in manifesting its intent that the set-off and counterclaim provision of the 1911 Act was to apply both to Tucker Act suits under 28 U. S. C. 1346 (a) and Tort Claims Act suits under 28 U. S. C. 1346 (b). The set-off and counter-claim provision originally contained in the 1911 Act (see 28 U. S. C. (1946 Ed.) 41 (20), *supra,* p. 9), and incorporated by reference thereto in the later Tort Claims Act (see 28 U. S. C. (1946 Ed.) 932), was established as a separate subsection, 28 U. S. C. 1346 (c), in the 1948 revision, which stated:

> (c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

The placing of the counterclaim provision in a separate subsection following the 1911 Act and Tort Claims Act subsections of 28 U. S. C. 1346, and expressly relating its applicability to both, presents a marked and revealing contrast to the method which

the court below employed to read the disability provision of the 1911 Act into the Tort Claims Act.

B. The Absence of a Disability Extension for the Tort Claims Act Limitations Period Represents a Consistent Congressional Policy With Respect to Tort Actions

We deem it significant that in every other Federal statute dealing with Governmental or private tort liability and the time limitations thereon, Congress has not seen fit to include a disability provision. Neither the Suits in Admiralty Act, 47 Stat. 420, 46 U. S. C. 745; the Public Vessels Act, 43 Stat. 112, 46 U. S. C. 782; the Jones Act, 41 Stat. 1007, 46 U. S. C. 688; the Carriage of Goods by Sea Act, 49 Stat. 1207, 1208, 46 U. S. C. 1303; nor even the Federal Employers' Liability Act, 53 Stat. 1404, 45 U. S. C. 56, contain disability provisions. Moreover, the courts have rejected attempts judicially to engraft those acts with disability extensions for infancy. See *Sgambati* v. *United States,* 172 F. 2d 297 (C. A. 2) (1949), certiorari denied, 337 U. S. 938; *Osbourne* v. *United States,* 164 F. 2d 767, 768 (C. A. 2) (1947); *Kalil* v. *United States,* 107 F. Supp. 966, 967 (E. D. N. Y.) (1952); *Wahlgren* v. *Standard Oil Co. of New Jersey,* 42 F. Supp. 992, 993 (S. D. N. Y.) (1941).[11]

[11] The foregoing cases all deal with actions brought under the Suits in Admiralty Act, Public Vessels Act, or Jones Act. The following cases, construing the limitations provisions of the Federal Employers' Liability Act, have denied disability extensions for any reason. *Damiano* v. *Pennsylvania R. Co.*, 161 F. 2d 534 (C. A. 3) (1947), certiorari denied, 332 U. S. 762; *Bell* v. *Wabash Ry. Co.*, 58 F. 2d 569 (C. A. 8) (1932); *Frabutt* v. *New York C. & St. L. R. Co.*, 84 F. Supp. 460 (D. Pa.) (1949); *Alvarado* v. *Southern Pac. Co.*, (Tex. Civ. App.) 193 S. W. 1108; *Jordan* v. *Baltimore and Ohio R. Co.*, 135

In that light, mere collocation of the 1911 Act and Tort Claims Act limitations provisions, as subsections of a single section of the present Judicial Code, certainly cannot be taken as a manifestation of Congressional intent to have the disability provision of the former dilute the absolute limitations bar of the latter. Nor, in this same light, does the prefacing of the disability provision of 2401 (a) with the words "[t]he action of any person under legal disability" denote such a drastic change. "A few words of general connotation appearing in the text of statutes should not be given a wide meaning contrary to a settled policy excepting as a different purpose is plainly shown." *United States* v. *American Trucking Associations,* 310 U. S. 534, 543–544 (1940). See also, *Ginsberg and Sons* v. *Popkin,* 285 U. S. 204, 208 (1932); and cf. the admonition of the Chief Re-

W. Va. 183 (1950), 62 S. E. 2d 806; *Wichita Falls & S. R. Co.* v. *Durham*, 132 Tex. 143 (1938), 120 S. W. 2d 803; *Wade* v. *Franklin*, 51 Ohio App. 318 (1935), 200 N. E. 644; *Gauthier* v. *Atchison T. & S. F. Ry. Co.*, 176 Wis. 245 (1922), 186 N. W. 619; *Bement* v. *Grand Rapids & Ind. Ry. Co.*, 194 Mich. 64 (1916), 160 N. W. 424. In one case, *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F. 2d 253 (C. A. 4) (1949), certiorari denied, 339 U. S. 819, the Fourth Circuit held that whereas infancy would not toll the running of the limitations period under F. E. L. A., fraud would have that effect.

Osbourne v. *United States*, 164 F. 2d 767 (C. A. 2), holds that there is one exception to the rule that in the absence of a specific disability provision the limitations period in these statutes will not be tolled, and that is where there is impossibility of access to the courts such as might happen in wartime to foreigners, enemy aliens, or our own personnel who are prisoners of war. 164 F. 2d 767, 768–769. Cf. *Hanger* v. *Abbott*, 73 U. S. 532 (1867).

viser, *supra,* p. 17. The placement of the two subsections in relation to the disability clause, the absence of language directly relating the disability provision of 2401 (a) to the disparate and seemingly absolute bar of 2401 (b), and the Reviser's commentaries (*supra,* pp. 13–16), not only fail to show a departure from the limitations scheme established by the 1946 Tort Claims Act and other Federal tort statutes, but clearly manifest its continuance.

Perhaps the consistent Congressional policy of refusing to provide disability extensions to time limitations on tort actions is grounded on the nature of the action. Contract actions, the type of suits most frequently brought under 1346 (a), to which 2401 (a) applies, are more apt to have as the indicia of the cause of action and basis for recovery evidence that has been committed to written memorials, whereas, tort claims are generally almost entirely reliant on the transient and fading memory of witnesses. This difficulty with respect to tort litigation is compounded where the Government is the defendant. In many instances, the United States is without knowledge of injuries allegedly inflicted by an employee until suit is instituted. At that point, the employee involved may have terminated his Government service or become otherwise unavailable. Such factors, considered in conjunction with the magnitude of the Government's operations, underscore the progressive and often insurmountable difficulty in defending tort actions as the time between accident and suit increases.

The facts of the instant case are illustrative. In the nearly four years between the time appellee's cause of action arose and the time this suit was instituted, the medical facility at which appellee was delivered was closed and its records either transferred or destroyed (R. 49). Moreover, most of the personnel who participated or assisted in appellee's delivery had been discharged from the service and certain vital witnesses, such as the pediatrician who examined and cared for appellee after his birth, had not been located when trial was imminent (R. 49–51).

The impediments to the presentation of a proper defense after a four-year delay are readily apparent. To extend the potential limitations period on tort claims to twenty-four years, as the court below would do by its addition of a disability proviso to 2401 (b), would immeasurably increase such difficulties in these actions. Accordingly, the Congressional conclusion that a reasonable defense is possible only when actions are brought within two years of the time when the cause first accrues, is a sound one. See House Report 1754, 80th Cong., 2d Sess., 4; cf. Hearings before Subcommittee No. 1 of the House Judiciary Committee on H. R. 7236, 76th Cong., 3d Sess., 20, 38.

Speculation as to motivation, however, is fruitless, when, as here, the Congressional injunction as to limitations is clear. See *Kavanagh* v. *Noble,* 332 U. S. 535, 539, rehearing denied, 333 U. S. 850. The jurisdictional nature of time limitations on suits against the United States dictates strict judicial adherence thereto, and any exceptions must be created by explicit language and not by indirection. *Munro* v. *United*

States, 303 U. S. 36, 41 (1938); *Finn* v. *United States,* 123 U. S. 227 (1887); *Kendall* v. *United States,* 107 U. S. 123 (1882); *Edwards* v. *United States,* 163 F. 2d 268 (C. A. 9) (1947).

C. Every Other Court Which Has Passed on This Question Has Ruled That the Disability Provision of 28 U. S. C. 2401 (a) Does Not Apply to 28 U. S. C. 2401 (b)

The considerations previously elaborated have led all courts which have been presented with this question, save the court below, to rule that the disability provision contained in 28 U. S. C. 2401 (a) is inapplicable to toll the limitation on tort actions found in 28 U. S. C. 2401 (b). The question was first considered in *Whalen* v. *United States,* 107 F. Supp. 112 (E. D. Pa.) (1952), wherein a minor plaintiff brought suit under the Tort Claims Act for injuries received nearly five years previously. To defeat the Government's motion to dismiss on the ground that the action was time barred, the plaintiff's guardian relied on the disability provision of 28 U. S. C. 2401 (a). In rejecting this argument, and granting the Government's motion to dismiss, the district court stated (107 F. Supp. at 113):

> The above subsection [28 U. S. C. 2401 (a)] formerly appeared as part of § 24 (20) of the old Judicial Code, as amended, 28 U. S. C. (1940 Ed.) § 41 (20). It was part of our law long before the Federal Tort Claims Act came into existence. It was therefore independent of the latter Act. Merely because the subsections now appear under the same heading in the United States Code of 1948, as amended, it does not mean that the first subsection is to

control the following one. Subsection (a) has no legal effect on actions controlled by subsection (b) of Sec. 2401.

Subsequently, the *Whalen* decision was followed in *Foote, et al.* v. *Public Housing Commissioner of the United States,* 107 F. Supp. 270 (W. D. Mich.) (1952), in which an administrator's suit to recover damages arising out of the deaths of minor children was dismissed because of the running of the two-year period specified in 28 U. S. C. 2401 (b).

The court below rejected the rationale and holding in *Whalen,* and purported to distinguish *Foote.* It stated that in *Foote,* the issue at bar was never reached as the disability extensions were there denied because the persons for whom the disability was claimed were deceased, and that the court in *Foote* had ruled only that the disability provision in § 2401 (a) was restricted to the disability of living persons (R. 60).

Whalen, we submit, was correctly decided, as was *Foote.* Moreover, even a cursory reading of *Foote* makes it clear that the deaths of the minors were not the sole, or even the primary, basis for rejecting the disability argument. The court in *Foote* first discussed the different statutory origins of 2401 (a) and 2401 (b) and concluded (107 F. Supp. at 275):

> It can hardly be contended that the disability provision originally found in § 41 (20) was intended to apply to or have any relation whatever to the widely separated legislative enactment of the statute of limitations in the original Tort Claims Act, § 942. The legislative history of the 1948 revision of Title 28 U. S. Code, does

> not in any way indicate that the provision of § 2401 (a) relative to persons under disability was to apply to the limitation provision relative to tort actions in § 2401 (b). * * * In 1949 § 2401 (b) was amended to provide for a two-year period of limitation for tort actions against the United States, and again there is no indication that it was intended that the tolling provision of § 2401 (a) should apply to § 2401 (b).

Foote then goes on to quote approvingly from the language of *Whalen* (*supra,* pp. 24–25), and concludes that "the provisions of § 2401 (a) relative to persons under disability [are] not applicable to § 2401 (b)." 107 F. Supp. at 275–276. It is only thereafter that *Foote* states, in a single brief sentence, that "furthermore" the disability provision of § 2401 (a) relates only to the disability of living persons. 107 F. Supp. at 276.

In addition, in *Brereton* v. *United States,* Civil No. 890 S. D., District of South Dakota, decided February 17, 1955 (not reported), the district court determined without reference to either *Whalen* or *Foote* that the disability provision of 2401 (a) had no application to the Tort Claims Act limitation in 2401 (b).

Nor, it might here be added, do any considerations based upon purported equitable factors dictate an opposite conclusion. The Court of Appeals for the Second Circuit, in *Sgambati* v. *United States,* 172 F. 2d 297, certiorari denied, 337 U. S. 938, disposed of the contention that it was inequitable to deny the dispensation of a disability provision to a minor tort claimant, by pointing out that the plaintiff could have sued

by a next friend within the normal statutory period, 172 F. 2d at 298.[12] The situation is no different here. The district courts were available at all times to the minor Glenn's mother during the two years following his purported injury at the hands of Government employees, and suit could as readily have been brought by her then, as it has been now. The delay of nearly four years was not occasioned by any legal disability on the part of her son, but merely by her own inaction. In any event, as emphasized by this Court, jurisdiction to sue the Government "is not a matter of sympathy or favor. The courts are bound to take notice of the limits of their authority." *Edwards* v. *United States,* 163 F. 2d 268, 269 (C. A. 9) (1947), quoting *Reid* v. *United States,* 211 U. S. 529, 539.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed with directions to dismiss the action as untimely.

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DECEMBER, 1955.

[12] Plaintiff in *Sgambati* brought his action alternatively under the Suits in Admiralty Act or the Public Vessels Act.

U. S. GOVERNMENT PRINTING OFFICE: 1955

No. 14860

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

MICHAEL GLENN, a Minor, by and through his Guardian *ad Litem,* Ida Mae Glenn,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Appellee adopts the Jurisdictional Statement and Statement of the Case set forth in Appellant's Brief.

Question Presented.

The question presented for decision is whether the two-year statute of limitations for asserting tort claims against the United States should be tolled during the infancy of the plaintiff.

ARGUMENT.

I.

Section 2401 Provides That the Time Limitations on All Actions Against the Government Are Tolled During Legal Disability.

A. A provision for tolling the statute of limitations in actions against the government during the legal disability of the claimant was initially contained in 28 U. S. C. (1946 ed.) 41(20), derived from section 24(20) of the Judiciary Act of 1911, 36 Stat. 1093, and section 2 of the Tucker Act (1887), 24 Stat. 505. This section set forth a general six-year period of limitation for suits against the government, subject to the provision that said period of limitations was tolled during the disability of married women, minors, persons of unsound mind, and persons beyond the seas, and for a period of three years after the disability ceased. At the time of this enactment no tort claims were permitted against the United States, and the statute therefore, in express terms, applied only to contract actions against the government.

B. In 1946 Congress passed the Federal Tort Claims Act (Legislative Reorganization Act, Title IV, 60 Stat. 842) permitting tort claims against the Government, and provided therein a "statute of limitations" of one year for the assertion of such claims. (28 U. S. C. (1946 Ed.) 942.) No express reference was made in said legislation to the matter of tolling the period of limitations during legal disability, although the statute did provide that the United States should be liable "in the same manner and to the same extent as a private individual under like circumstances." (28 U. S. C. 2674.) We do not know why an express provision for tolling the statute

during legal disability was not included in the Act. Presumably Congress assumed that such a fundamental principle of fairness, deeply inbedded in Anglo-American jurisprudence (see *Sims v. Everhardt,* 102 U. S. 300, 309-310), would be given effect by the courts. (See argument under II, *infra.*) Nor do we know what sentiment arose in Congress during the two years following enactment of the statute for express inclusion of such a provision therein.

C. We do know, however, that as part of a general revision of the Judicial Code in 1948 Congress repealed both section 41(20) and section 942 of Title 28 of the United States Code and enacted a single new section, 28 U. S. C. 2401, which sets forth the time limitations for bringing actions against the Government and provides for the tolling of such time limitations during periods of legal disability of the claimant. This new section does not consist merely of the old sections 41(20) and 942 placed together in one location. On the contrary, section 2401 contains new language which differs in material respects from the language of the old sections. Subsection (a) of the new section provides for a general six-year statute of limitations on all actions brought against the government, without restrictions as to the type of action, whether contract or tort, and said subsection further provides that persons under a legal disability may assert their action within three years after the disability ceases —again without restriction as to the type of action, whether contract or tort. Subsection (b) of the new section provides a two-year period of limitations for filing suit on tort claims exceeding $1,000 and for making written claim to the appropriate federal agency on tort claims not exceeding $1,000. (In 1949 the section was

amended to increase the period of limitations on tort claims from one year to two years. (63 Stats. 62.))

D. Did Congress by the enactment of this new section make express provision for tolling the statute of limitations in favor of persons under a legal disability as to *all* actions against the government, both contract and tort? The meaning of the language of the section indicates this was done, and of course "the words by which the legislature undertook to give expression to its wishes" offer the best evidence of what was intended by the enactment. (*United States v. American Trucking Ass'ns,* 310 U. S. 534, 543-544.)

(1) The second sentence of subsection (a) of 2401 provides that *"the action* of *any person* under legal disability or beyond the seas at the time *the claim* accrues may be commenced within three years after the disability ceases." (Emphasis added.) Nothing in this sentence or in the sentence which precedes it limits its application to contract actions. The plain meaning of the sentence is that it applies to *all* actions against the government whether contract or tort. This conclusion is reinforced by the fact that the phraseology of the old section 41(20), which did expressly limit the application of its disability provision to contract actions, was abandoned in the drafting of the new section, so that the provision as to disability in the new section refers to "the action of any person" without restriction as to the type or category of the action.

(2) Appellant contends that the application of the disability provision in the new section is confined to contract actions because the provision is placed in subsection (a) of 2401 while the period of limitation as to tort claims is covered in subsection (b). Analysis of subsection

(a), however, does not support Appellant's argument. Whatever the source of subsection (a) it is not, according to its terms, confined to contract actions. The first sentence of said subsection provides that *"Every civil action* commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." (Emphasis added.) "Every civil action" means every action, contract or tort. In this respect also the language of the section is materially different from the old section 41(20) which confined the six-year period of limitations to contract actions brought pursuant to that section.

Thus, subsection (a) of the new section provides for a general period of limitations on all actions against the government, contract or tort, of six years, and for a tolling of the limitation period *on all actions* in favor of persons under a legal disability until three years after the disability has been removed. Subsection (b) then specifically provides a shorter period of limitations for tort claims against the government, thereby setting up an exception to the general six-year limitation period of subsection (a). There is nothing, however, in the exception contained in subsection (b) which states in any way that the disability provision in the second sentence of subsection (a) does not apply to tort claims, and as an exception, subsection (b) should be limited to its terms. It must be kept in mind that these two subsections are merely paragraphs of a single section, enacted under a single heading, and said section and each part thereof should be construed and given effect as a unit, in preference to treating each subsection as a separate and distinct section, complete in itself, as Appellant in effect would do.

(3) Thus it appears that reasonably interpreted the language of section 2401 says in effect: There is a general six-year statute of limitations on all actions, contract or tort, brought against the government; the period of limitations on all actions, contract or tort, is tolled in favor of a person under a legal disability until 3 years after the disability is removed; provided, however, that as to tort claims asserted against the government the period of limitations shall be two years.

(4) This reasonable construction of the plain language of the statute is not contradicted by the Reviser's Notes upon which Appellant relies so heavily. These notes, which are set forth in full in the Memorandum of Decision of the District Court [R. 64-65], in effect simply point out the changes in language which have been made in section 2401 as compared to the old sections 41(20) and 942. In referring to such change of language, moreover, the Notes in two instances state "See Reviser's Note under section 2501 of this title." Section 2501 contains similar provisions with regard to the period of limitations on actions brought in the Court of Claims, and the Reviser's Notes under that section state in part:

> "The revised language will cover all legal disabilities actually barring suit. For example, the particular reference to married women is archaic, and is eliminated by use of the general language substituted.
>
> "Words 'nor shall any of the said disabilities operate cumulatively' were omitted, in view of the elimination of the reference to specific disabilities. *Also, persons under legal disability could not sue, and their suits should not be barred until they become able to sue.*" (28 U. S. C. A. foll. 2405. Emphasis added.)

This quotation from the Reviser's Notes clearly enunciates a policy that suits by all persons not able to sue because of a legal disability should not be barred until they become able to sue. Since the Notes under section 2401 make specific reference to this statement, it appears that the same policy motivated the enactment of section 2401 and that section should be interpreted accordingly.

(5) Appellant points out that if the disability provision of section 2401 is held to apply to tort claims a claimant under a legal disability will be given a longer period after the removal of the disability in which to bring suit (3 years) than the initial period of limitations on tort actions (2 years). This is not sufficient grounds, however, for disregarding the express language of the section. The explanation would appear to be simply that Congress chose to utilize the same general disability clause for all actions, contract and tort. The omission to provide that the period of limitations should end two years after the removal of the disability with respect to tort actions may have been an oversight on the part of the drafters or it may reflect a policy of giving persons under a disability a somewhat longer period in which to bring their case after removal of the disability, but whatever the explanation the express provision of the statute should control.

II.

The Time Limitation of Section 2401(b) Is a "Statute of Limitations" Which Under Federal Law Is Tolled During Legal Disability.

A. The Federal Courts in a number of cases have held that statutes of limitations are ordinarily tolled during the time plaintiff is prevented from suing because of legal disability or fraud of the defendant, even in the absence of express provision to this effect. The same cases further hold, however, that if the time limit for bringing suit constitutes a "substantive condition" of the right created by the statute in which it is set forth, rather than a "statute of limitations," then suit must be brought within that time period without regard to legal disabilities or fraud. (*Sgambati v. United States,* 172 F. 2d 297; *Osbourne v. United States,* 164 F. 2d 767, 768; *Wahlgren v. Standard Oil Company,* 42 Fed. Supp. 992; *Kalil v. United States,* 107 Fed. Supp. 966; *Frabutt v. New York C. & St. L. R. Co.,* 84 Fed. Supp. 460; *Damiano v. Penn. R. Co.,* 161 F. 2d 534. See *Scarborough v. Atlantic Coast Line R. Co.,* 178 F. 2d 253.) These cases, all cited in Appellant's Brief, include actions brought against the United States Government.

1. As indicated by the above cases a statute of limitations must be differentiated from a statute in which the time fixed forth for bringing the action is treated as an inherent part of the right created by the statute. As stated in 34 *Am. Jur.* 16:

> "A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within

> which that action may be commenced, *is not a statute of limitations.* It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right." (Emphasis added.)

In the above cited cases the time periods for bringing suit under the Federal Employers Liability Act and related statutes, to wit, the Jones Act, the Suits in Admiralty Act, the Public Vessels Act, were held to constitute, *not statutes of limitations* which would be tolled during legal disability or for fraud, but substantive conditions to the exercise of the rights created by the statutes, which are not affected by legal disabilities or fraud.

B. As distinguished from the Federal Employers Liability Act and related acts, referred to above, however, the period of limitations set forth in the Federal Tort Claims Act is a *statute of limitations* rather than a substantive condition. The time limitation provision of the Tort Claims Act when enacted was expressly entitled by its codifiers "Statute of Limitations" (28 U. S. C., 1946 ed., 942), and it has been designated a statute of limitations rather then a substantive condition in *Sweet v. United States,* 71 Fed. Supp. 863, 864, and in *Maryland to the use of Burkhardt v. United States,* 165 F. 2d 869, at 873, wherein the court stated (p. 873):

> "As was well said by Judge Yankwich in *Sweet v. United States,* D. C., 71 F. Supp. 863, 864, answering the argument that the language of 410 (a) of the act incorporated the one year limitation on actions for tort of the California law: 'The sovereign having

> waived immunity, this clause, without anything else, might possibly be construed to mean that the state statute would apply. But the Congress specifically enacted section 420, 28 U. S. C. A. sec. 942, which the codifiers entitled *"Statute of Limitations."* . . . And we think it makes no difference that the limitation applicable to the action for death by wrongful act is held under state law to be a condition on the exercise of the right rather than a limitation on the remedy. This holding is based upon the narrow ground that the limitation is imposed by the statute creating the cause of action[2] and is, to say the best of it, technical and legalistic reasoning, which is not followed in all the states. ([2]It may be observed that the limitations in the Tort Claims Act is also imposed by the statute creating the cause of action; and *if importance is to be attached to this distinction,* it is a reasonable assumption that Congress intended the condition created by its own act to apply rather than one relating to the same subject matter contained in the State law.)" (Emphasis added.)

Thus, under the federal cases the Federal Tort Claims Act is to be differentiated from the Federal Employers Liability Act and related acts in that the time for bringing suit under the former is a statute of limitations and the time for bringing suit under the latter is a substantive condition. Therefore, the period of limitations is tolled during legal disability under the Tort Claims Act but not under the other acts named.

C. An important reason for this distinction between the Federal Tort Claims Act and the Federal Employers Liability Act and related statutes is indicated in the cases cited above holding the time limitations of the latter acts are substantive conditions rather than statutes of limita-

tions. These cases state as a basis for their holdings that said statutes created new rights unknown to the common law. This, however, is not true of the Federal Tort Claims Act. The substantive right made available to plaintiffs by that act is simply the old common law right of action for negligence. True, the sovereign could not be sued for negligence at common law, but this freedom from suit was merely an immunity on the part of the sovereign constituting a defense to the common law action. The common law right of suit for negligence continued to exist subject to a defense of immunity on the part of the sovereign. This defense could be waived by the sovereign and has in fact been waived by the United States through the Federal Tort Claims Act (*Cerri v. United States,* 80 Fed. Supp. 831 at 833; *Sweet v. United States,* 71 Fed. Supp. 863, 864), thereby leaving plaintiffs free to assert their basic common law cause of action. The Tort Claims Act does not create a new kind of action; it does not create a cause of action at all; it merely waives the government's defense of immunity to suit.

1. That the basic cause of action under the Tort XXXXXX Claims Act is a common law cause of action is made clear by the provision of the act that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." (28 U. S. C. 2674.) This clause, of course, does not mean that the statute of limitations of the State wherein the tort occurred is to apply to suits brought pursuant to the act, and in fact the courts have expressly held that the clause does not have that effect (*Maryland v. United States,* 165 F. 2d 869; *Sweet v. United States,* 71 Fed. Supp. 864), but the clause does in-

dicate that the cause of action which a plaintiff asserts against the government under the Tort Claims Act is simply the same common law cause of action that is asserted against private persons. (*United States v. Campbell,* 172 F. 2d 500 at 503; *Cerri v. United States,* 80 Fed. Supp. 831 at 833.)

D. Serious doubt has been cast upon the entire doctrine that the time limitations contained in the Federal Employers Liability Act and related statutes are unaffected by legal disability or fraud, and several exceptions have been made which are not consistent with the rule. (*Scarborough v. Atlantic Coast Line R. Co.,* 178 F. 2d 253; *Osbourne v. United States,* 164 F. 2d 767; *Frabutt v. New York C. & St. L. R. Co.,* 84 Fed. Supp. 460; See *Maryland to the use of Burkhardt v. United States,* 165 F. 2d 869.)

1. In the *Scarborough* case the court held the time period of the Federal Employers Liability Act was suspended during the period that plaintiff was prevented from bringing suit by the fraud of the defendant. In the *Osbourne* and *Frabutt* cases the court held the time limitation was suspended during the period that plaintiff was prevented by war from bringing suit.

2. These exceptions to the rule and doubts as to its ultimate soundness have grown out of the extreme inequity of the doctrine, its technical nature, and the failure of the courts following it to give full and serious consideration to the logic and fairness of its application. As stated by the Court of Appeals for the 4th circuit in *Scarborough v. Atlantic Coast Line R. Co.,* 178 F. 2d 253, at 258-259, in reversing the District Court which had refused to suspend the time period of the Employers Liability Act

during the period plaintiff was prevented from bringing suit by the fraud of the defendant:

> "We have endeavored to set out fairly the law with which we are here concerned, as it has been stated in the cases decided by the courts. If dicta be considered, the weight of such primary authority appears to favor the view expressed by the District Court. In none of these cases, does the opinion fairly face, with an adequate discussion of the question on principle, the precise problem now before us. The cases cited as favoring the appellee based their holdings on *the narrow technical distinction between the two types of statutes of limitations* and then state baldly that, by virtue of this legalistic distinction, fraud does not toll the running of a statute of limitations which is of the substantive type. Under these circumstances, we do not consider ourselves bound by this seeming weight of judicial authority. We, accordingly, feel free to decide this case on principle. . . .
>
> "The decisions in the *Osbourne* and *Frabutt* cases, *supra,* show clearly that *there is a chink in the supposedly impregnable armor of the substantive time limitation of the Act. If, as those cases cited, there is one exception (war), surely the infinite variety of human experience will disclose others. Those cases demonstrate that a claim under the Act is not a legal child born with a life span of three years, whose life must then expire, absolutely, for all purposes and under all circumstances.* True it is that war physically prevents access to the courts, however anxious a litigant may be to bring suit. Fraud, however, as in the instant case, may be equally as effective in preventing one from seasonably suing on his claim. . . .
>
> "Judge Frank in the *Osbourne* case and Judge Parker in the *Burkhardt* case [*Maryland to the use of Burkhardt v. United States,* 165 F. 2d 869], *supra,*

have shown that *the distinction between a remedial statute of limitations and a substantive statute of limitations is by no means so rock-ribbed or so hard and fast as many writers and judges would have us believe.* Each type of statute, after all, still falls into the category of a statute of limitations. And this is none the less true even though we call a remedial statute a pure statute of limitations and then designate the substantive type as a condition of the very right of recovery. There is no inherent magic in these words." (Emphasis added.)

3. According to the above quotation the time period for bringing an action, whether it be a true statute of limitations or a substantive condition, should be suspended during the period that plaintiff is prevented from bringing suit without fault on his part. Surely infancy may offer as effective a bar to suit as fraud on the part of defendant or the exigencies of war. An infant is legally barred by reason of his infancy from bringing suit. Appellant casually suggests that the infant may sue by next of friend. But he may have no next of friend. The rule contended for by Appellant in this case will be applicable to all infants in all situations. It will apply to a new born baby whose parents are dead, to children of tender years who are abandoned, to children whose parents are too ignorant and uninformed to protect the rights of their children. It will apply also to insane persons without friends or kin confined in mental institutions. In such situations the person under disability is as effectively prevented from bringing suit as a person who is held a prisoner of war or who is misled by misrepresentations. To bar such per-

sons permanently from bringing suit before termination of their disability is discrimination so shocking that such an intention should not be attributed to Congress if it can reasonably be avoided.

4. In the present case the following facts are all undisputed: Appellee is a colored boy who suffered alleged injuries at the time of his birth, December 5, 1949, in a naval hospital in Seattle, Washington. [R. 18-20, 52, 54.] His father was in the armed forces at the time and shortly after appellee's birth was sent to Korea where he was killed in action. [R. 73.] His mother who was 22 years old at the time of his birth had attended school only through the seventh grade. (Deposition of appellee's mother, Ida Mae Glenn, taken by Appellant Nov. 22, 1954, pp. 3, 6, not included in Record because of stipulation for judgment without trial.) Under these circumstances certainly it may be reasonably said that this boy could not effectively bring suit for his injuries within two years after the occurrence of the alleged injuries. The District Court expressly found that appellee is a person under a legal disability by reason of his minority [R. 73] and that his is not barred from bringing the action by the two-year period of section 2401(b). [R. 74.] Under the principles enunciated in the *Scarborough* case the trial court at least should have discretion to find that, by reason of his extreme infancy and the other circumstances of the case, plaintiff was in effect prevented from bringing suit within the statutory period without fault on his part and that the period of limitations

was therefore tolled. So long as it has a reasonable basis in fact this exercise of discretion should not be disturbed by an appellate court.

For the foregoing reasons it is respectfully submitted that the judgment appealed from should be affirmed.

Respectfully submitted,

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No. 14860

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MICHAEL GLENN, A MINOR, BY AND THROUGH HIS GUARDIAN, AD LITEM, IDA MAE GLENN, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR APPELLANT

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CITATIONS

375338—56

In the United States Court of Appeals for the Ninth Circuit

No. 14860

UNITED STATES OF AMERICA, APPELLANT

v.

MICHAEL GLENN, A MINOR, BY AND THROUGH HIS GUARDIAN, AD LITEM, IDA MAE GLENN, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR APPELLANT

1. Appellee, in its brief, strives to create the impression that a number of Federal courts have held that in suits against the United States "statutes of limitations are ordinarily tolled during the time plaintiff is prevented from suing because of legal disability or fraud of the defendant, even in the absence of express provision to this effect." Appellee's Brief, p. 8. A number of cases are set forth which purportedly embody that principle. Appellee's Brief, p. 8. Examination of those decisions, however, compels a contrary conclusion. Only three (*Sgambati* v. *United States,* 172 F. 2d 297 (C. A. 2) (1949), cer-

tiorari denied, 337 U. S. 938; *Osbourne* v. *United States,* 164 F. 2d 767 (C. A. 2) (1947); and *Kalil* v. *United States,* 107 F. Supp. 966 (E. D. N. Y.) (1952)) involved the Government as defendant. Of these three cases, *Sgambati* and *Kalil* deny disability extensions for lack of an express statutory provision. The third, *Osborne,* holds that there is one exception to the rule that in the absence of a specific disability provision, the limitations period in these statutes will not be tolled, and that is where there is physical impossibility of access to the courts such as might happen in wartime to foreigners, enemy aliens, or our own personnel who are prisoners of war. 164 F. 2d 767, 768–769. However, *Osbourne* recognizes that no such disability extensions can be judicially created for infancy. 164 F. 2d 767, 768.

The remaining cases cited by appellee (Brief, p. 8) all involve suits against private parties authorized by Federal statutes, principally the Federal Employers' Liability Act. Even in those cases, all but one court deny disability extensions for any reason since unauthorized by statute. The one exception is *Scarborough* v. *Atlantic Coast Line R. Co.,* 178 F. 2d 253 (C. A. 4), certiorari denied, 339 U. S. 919, discussed *infra,* pp. 7–8, in which the Fourth Circuit held that fraud would toll the running of the limitations period under the Federal Employers' Liability Act.

It is appellee's position, however, that irrespective of the actual decisions in those cases, their underlying rationale is as follows: If the time limit for bringing suit is a "substantive condition" of the right created by the statute in which the limitation is set forth,

then suit must be brought within that time period without regard to legal disabilities. However, if the time limitation is merely a qualification of the remedy, then a disability may toll the limitations period notwithstanding the absence of any express provision to that effect in the statute (Brief, pp. 8–10). Appellee argues that the limitations periods of such statutes as the Suits in Admiralty Act, Public Vessels Act, and Federal Employers' Liability Act come within the substantive class, whereas the limitations of the Tort Claims Act affect merely the remedy. Accordingly, he concludes, even absent an express disability provision, the limitations of the Tort Claims Act may be tolled for disability (Brief, p. 9).

The short answer to the foregoing is that the limitations of the Tort Claims Act, whether they be designated procedural or substantive, are jurisdictional, and must be rigorously adhered to by the courts. Extensions or exceptions must be found in the express language of the statute and are not to be created by implication. *Anderegg* v. *United States,* 171 F. 2d 127, 128 (C. A. 4) (1948), certiorari denied, 336 U. S. 967. See also, *Munro* v. *United States,* 303 U. S. 36, 41 (1938); *Finn* v. *United States,* 123 U. S. 227 (1887); *Edwards* v. *United States,* 163 F. 2d 268 (C. A. 9) (1947).

However, even pursuing appellee's theory, and accepting the distinction between limitations that condition the right and limitations that merely qualify the remedy, no different result is achieved. The limitations of the Tort Claims Act must be considered as

falling in the former class. Clearly they have none of the attributes of procedural time limitations. They need not be pleaded by the Government to be enforced by a court, and neither action nor neglect on the part of Government representatives can waive them. *Anderegg* v. *United States,* 171 F. 2d 127 (C. A. 4) (1948), certiorari denied, 336 U. S. 967; *De Bonis* v. *United States,* 103 F. Supp. 123, 126 (W. D. Pa.) (1952). Moreover, it is difficult to see how the rights created and the limitations placed thereon by the Tort Claims Act differ from the analogous rights and limitations of the Suits in Admiralty and Public Vessels Acts. Each of these Acts permits the bringing against the United States of actions sounding in tort. Each imposes a two-year limitation on the enforcement of those rights, and each contains no express disability exception to those limitations. In *Sgambati* v. *United States,* 172 F. 2d 297, certiorari denied, 337 U. S. 938, the Second Circuit refused to read disability exceptions into the limitations periods of the latter two Acts. The Tort Claims Act is in no different category.

Appellee places heavy reliance on Judge Yankwich's decision in *Sweet* v. *United States,* 71 F. Supp. 863 (S. D. Cal.), and the decision of the Fourth Circuit in *State of Maryland ex rel Burkhardt* v. *United States,* 165 F. 2d 869 (1947), to distinguish the Tort Claims Act from the other Acts insofar as the nature of the time limitations is concerned. This reliance, however, is misplaced. *Sweet* holds merely that the limitations period of the Tort Claims Act governs suits under that Act to the exclusion of whatever time limitations might be imposed by state law. The de-

cision assuredly did not hold that the Act's limitations are procedural rather than substantive. Judge Yankwich himself destroys any such notion in his paper before the Judicial Conference of the Ninth Circuit (June 28, 1949), *Problems Under The Federal Tort Claims Act,* published in 9 F. R. D. 143. After discussing his decision in *Sweet* and the Fourth Circuit's reliance on it in reaching the same conclusion in *Burkhardt, supra,* Judge Yankwich goes on to examine the nature of the time limitations of the Tort Claims Act and states (9 F. R. D. at 153):

> A note to the text [in the *Burkhardt* opinion] contains this observation:
>
> "It may be observed that the limitations in the Tort Claims Act is also imposed by the statute creating the cause of action; and if importance is to be attached to this distinction, it is a reasonable assumption that Congress intended the condition created by its own act to apply rather than one relating to the same subject matter contained in the State law." [165 F. 2d at p. 873.]
>
> The principle referred to is the familiar one that statutes of creation affect the right and not merely the remedy. From which it follows that the expiration of the period of limitation destroys the right. As said in a leading case:
>
> "The liability and the remedy are created by the same statutes, and *the limitations of the remedy are therefore to be treated as limitations of the right.*" The Harrisburg, 119 U. S. 199, 214 (1886). [Emphasis by Judge Yankwich.]
>
> And there is no jurisdiction to entertain the action after the expiration of the period within

> which it might have been brought. This because we are dealing *with a statute of creation* and not *with a statute of limitation* * * *. [Emphasis by Judge Yankwich.]

Accord in other Tort Claims Act suits: *United States* v. *W. H. Pollard Co., Inc.,* 124 F. Supp. 495, 497 (N. D. Cal. S. D.) (1954); *De Bonis* v. *United States,* 103 F. Supp. 119, 122 (W. D. Pa.) (1952).

Moreover, with respect to *Burkhardt,* the Fourth Circuit subsequently had the question of the nature of the limitations of the Tort Claims Act under consideration in *Anderegg* v. *United States,* 171 F. 2d 127 (1948), certiorari denied, 336 U. S. 967. After determining therein that the limitations of the Tort Claims Act must be strictly adhered to and may not be waived by action or neglect on the part of Governmental officers, *Anderegg* concluded (171 F. 2d at 128):

> Whether the limitation prescribed for suit by the Tort Claims Act be regarded as a condition of the right to sue or as a limitation upon the remedy would seem to be immaterial; but it should be noted that the limitation is imposed in the statute creating the right and the limitation in such case is ordinarily treated as a condition, as we pointed out in the note to *State of Maryland* v. *Burkhardt,* 4 Cir. 165 F. 2d, 869, 873.

Pursuit of appellee's own theory, therefore, fails to advance his cause—whether substantive, procedural, or jurisdictional, suit is precluded at the expiration of the two-year limitation period.

2. Appellee then shifts ground to argue that, irrespective of the substantive or procedural nature of

these limitations, extensions for disability may be granted by the courts. Reliance in this respect is placed on the decision of the Fourth Circuit in *Scarborough* v. *Atlantic Coast Line R. Co.,* 178 F. 2d 253 (1949), certiorari denied, 339 U. S. 919. There, in a suit under F. E. L. A., the court, rejecting the substantive-procedural differentiation, held that the limitations period would be tolled because the defendant fraudulently induced the plaintiff not to sue.

Scarborough, however, is inapplicable here. Initially, it was not a suit against the United States where principles of sovereign immunity are involved. Compare *Anderegg* v. *United States,* 171 F. 2d 127 (C. A. 4), certiorari denied, 336 U. S. 967, and cases cited *supra,* p. 3. Moreover, the *Scarborough* decision recognized such an exception for fraud only. The claimant in that case was a minor at the time his cause of action arose and forbore suit under the belief, fraudulently induced, that the limitations period was tolled until he reached his majority. The appellate court, however, did not hold the statute to be tolled on account of the plaintiff's infancy, but solely on the ground of defendant's fraud and the strong public policy against permitting a profit to its perpetrator. Finally, as recognized by the Fourth Circuit, even the exception injected by *Scarborough* is against the weight of authority in F. E. L. A. cases. 178 F. 2d at 257–258, and see cases cited in Appellant's opening brief, pp. 20–21, fn. 11.

The Fourth Circuit itself, in a recent decision, has indicated where it will draw the line in these cases. In *Williams, et al.* v. *United States, et al,* No. 6991 (C. A. 4),

decided December 16, 1955 (not reported as yet),[1] that court was faced with the contention that insanity tolled the two-year limitation of the Suits In Admiralty Act. In affirming the district court's rejection of that proposition (133 F. Supp. 317), the court of appeals stated:

> * * * The statute contains no saving clauses for disability of any kind. *Sgambati* v. *United States,* 172 F. (2d) 297, cert. denied 337 U. S. 938.
>
> Two exceptions to the rigid prevailing rule, that such statutes of limitations cannot be extended under any circumstances, have been carved out by our courts; in the prisoner of war situation, *Osbourne* v. *United States,* 164 F. (2d) 767; and in the fraud situation, *Scarborough* v. *Atlantic Coast Line R. Co.,* 4th Cir. 178 F. (2d) 253, cert. denied 339 U. S. 919. We are unimpressed with the argument that insanity likewise should toll this Statute of Limitations and we expressly hold that it does not. See, to like effect, *Kalil* v. *United States,* 107 F. Supp. 966, and also Judge Bryan's reasoning, 133 F. Supp. 318–319.[2]

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[1] Petition for certiorari pending, No. 549 Misc., United States Supreme Court, Oct. Term 1955.

[2] The district court opinion in *Williams*, 133 F. Supp. 317, makes the following observation (at p. 319):

> * * * An additional factor active here, but not present in the Scarborough case, is the immunity of the United States to suit. It holds the claimant to strict compliance with the very terms of the exceptive statute. The rigidity of the immunity is relaxed during the two years only. Indulgences for infancy or insanity are not a matter of right; nor does their absence invalidate the statute. Vance v. Vance, 1883, 108 U. S. 514, 521 * * *. Congress advisedly grants or withholds these tolerances. As witness: additional time for these contingencies is not accorded by the Federal Tort Claims Act, 28 U. S. C. A. §§ 1346, 2671 et seq., but it is allowed plaintiffs in the Court of Claims. 28 U. S. C. A. §§ 2404, 2501.

Accordingly, no sound basis exists for departing from previously established law. In the absence of an express disability provision, limitations on actions against the Government may not be tolled for infancy.

CONCLUSION

For the reasons stated above and in our main brief, it is respectfully submitted that the judgment of the district court should be reversed with directions to dismiss the action as non-timely.

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No. 14860

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

MICHAEL GLENN, a minor, by and through his Guardian *ad litem,* IDA MAE GLENN,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

PETITION FOR REHEARING.

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TABLE OF AUTHORITIES CITED

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MICHAEL GLENN, a minor, by and through his Guardian *ad litem,* IDA MAE GLENN,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

PETITION FOR REHEARING.

Plaintiff and Appellee respectfully petitions the Court for a rehearing on the following grounds:

1. It cannot be clearly determined from the majority opinion what is the basis for the holding that the disability provisions of U. S. C. section 2401 does not apply to actions in tort against the government. The opinion states that "it is not clear that the sentence in (a) qualified the limitation on tort claims set forth in (b)" and that therefore other indications of Congressional intention must be looked to. The only indications of Congressional intention to which the opinion refers, however, are that "there is no presumption that by a revision which lifts two

limitation clauses out of respective context, rewords them a little, and sets them down with separate sublettering in a separate limitations section that the whole of the two were intended to be commingled," that "there is no committee report and no Congressional colloquy or debate that sustains the position of plaintiff-appellee," and that "the reviser's notes which purported to pinpoint substantial changes in the judicial code are silent on any intent to have any tolling provision wash into the Federal Tort Claims Act." The sum and substance of these statements is that there is no substantial evidence of Congressional intention other than the statute itself. The court in effect says: "The meaning of the statute is not clear therefore we must look to other evidence of Congressional intent. There is little or no other evidence of Congressional intent, therefore we hold that the disability provision of subsection (a) does not apply to subsection (b)." This conclusion does not follow from the prior statements. In the absence of more definite evidence of Congressional intention, the Court must return to the language of the statute itself and determine what is the proper interpretation of the actual language used. This the Court has expressly refused to do.

2. The opinion does not consider the fact that the new section 2401 does not consist merely of the old sections placed together in one location, but that on the contrary section 2401 contains new language which differs in material respects from the language of the old sections. In particular, the wording of subsection (a) of 2401 provides for tolling of the statute of limitations during disability on *all actions* brought against the government *whether contract or tort* as distinguished from the old section 4120 which applied only to contract actions.

3. The opinion does not give consideration to the fact that subdivisions (a) and (b) are but component parts of a single section which must be construed together as a unit rather than as if each subsection was a section separate unto itself.

4. The opinion does not consider the fact that the reviser's notes under section 2401 make specific reference to the notes under section 2501, which section contains similar provisions with regard to actions brought in the Court of Claims, and that the notes under section 2501 state in part: "The revised language will cover all legal disabilities actually barring suit . . . Also persons, under legal disability could not sue, and their suits should not be barred until they become able to sue," which statement offers specific evidence of a policy not to bar from suit persons under a disability.

5. The opinion does not consider in any way the meaning or effect upon the question presented of section 2674 which provides that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." Since the statute of limitations on tort claims against private individuals is ordinarily tolled during the disability of the plaintiff, this section indicates an intention on the part of Congress to have a similar policy apply with regard to the government.

6. Finally, the opinion does not discuss in any manner Appellee's contention, set forth under II. of Appellee's Brief, that under the decisions of the Federal Courts including cases against the government a statute of limitations, as distinguished from a substantive condition, is ordinarily tolled during disability or fraud of the plaintiff,

even in the absence of an express provision to this effect. In particular, the opinion gives no consideration to the case of *Scarborough v. Atlantic Coast Line R. Co.,* 178 F. 2d 253 at 258-9 holding that the period for bringing suit under the Federal Employers Liability Act is tolled by fraud even in the absence of an express provision to this effect and stating that the "infinite variety" of human experience would disclose other circumstances which would justify tolling the time limitation for bringing suit even in the absence of an express provision in the statute.

Appellee further respectfully suggests that the matter should be heard and decided by the full court in banc because of the importance of the question involved and the fact that it has not heretofore been passed upon by any Appellate Court.

Respectfully submitted,

SAMUEL A. ROSENTHAL,
NORMAN WARREN ALSCHULER,
LEONARD G. RATNER,
By LEONARD G. RATNER,
Attorneys for Appellee.

Certificate of Counsel.

I, Leonard G. Ratner, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

LEONARD G. RATNER,
Attorney for Petitioner.

No. 14,861

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM FRANCIS RUPP,
Appellant,

vs.

HARLEY O. TEETS, Warden, California State Prison, San Quentin, California,
Appellee.

BRIEF FOR APPELLEE.

EDMUND G. BROWN,
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IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM FRANCIS RUPP,

Appellant,

vs.

HARLEY O. TEETS, Warden, California State Prison, San Quentin, California,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Appellant is in the custody of Harley O. Teets, Warden of the California State Prison at San Quentin, California.

Rupp was tried and found guilty of murder in the first degree by a jury in the County of Orange, State of California. The conviction of this offense was affirmed by the California Supreme Court on August 14, 1953. (*People v. Rupp,* 41 Cal. 2d 371.) Petitioner thereafter sought and was denied a petition for writ of habeas corpus in the federal district court. (*Rupp v. Teets,* 117 Fed. Supp. 376).

The appeal from this denial was dismissed as frivolous by the court of appeals since petitioner had not exhausted his state remedies. (*Rupp v. Teets,* 214 Fed. 2d 312.)

Thereafter, petitioner sought a writ of habeas corpus in the California Supreme Court. This petition was denied on November 17, 1954 without opinion. Petitioner sought a writ of certiorari as a result of the denial of the petition for writ of habeas corpus in the California Supreme Court. Certiorari was denied on March 28, 1955, and petitioner again sought a writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division. This petition was denied by the district court on June 24, 1955. (See RT 20-25.) The time for filing the notice of appeal elapsed, petitioner then filed another petition which was denied on August 4, 1955 by the district court (CT 16-17), and a further stay of execution was granted.

STATEMENT OF THE FACTS.

The sordid details of the crime of which appellant has been convicted are fully set forth in the opinion of the Supreme Court of the State of California. (*People v. Rupp,* 41 Cal. 2d 371, 260 P. 21.) They are not challenged and will not be repeated here.

The material procedural facts relating to the conviction are as follows: Rupp was tried and found guilty of the crime of murder in the first degree by

a jury in the County of Orange, California. He was represented by counsel at the trial. In a separate proceeding the same jury found him to be sane at the time of the commission of the offense.

An appeal was taken to the Supreme Court of California. On this appeal Rupp contended that the California trial court erred in rulings on the admission of evidence and instructions to the jury. It was also argued that it was error to try the issue of insanity before the same jury which heard evidence concerning the commission of the crime. There was also a claim of prejudice resulting from certain remarks of the trial judge. No federal constitutional questions were raised on the appeal. (See 41 Cal. 2d 371, 377.)

The California Supreme Court resolved the question of law against Rupp and the judgment was affirmed. Certiorari was not sought. Petitioner subsequently sought to raise the present contention in a writ of habeas corpus directed to the California Supreme Court, which was denied. He now appeals from a denial of a writ raising these same contentions by the United States District Court.

APPELLANT'S CONTENTIONS.

I.

The court below erred in denying the petition for writ of habeas corpus without granting a hearing.

II.

The court erred in not finding that the California trial court denied petitioner due process of law by excluding certain medical-psychiatric testimony at the trial which was relative to petitioner's sole defense.

III.

The court below erred in not finding that the California trial court denied petitioner due process of law when it required him to submit to trial on his plea of not guilty by reason of insanity by the same jury which found him guilty of the crime charged in which the jury had been prejudiced by the remarks of the trial judge.

SUMMARY OF APPELLEE'S ARGUMENT.

I.

Petitioner has waived the alleged errors by his failure to raise these questions on his appeal to the California Supreme Court. Petitioner has not exhausted his state remedies.

II.

The alleged exclusion of certain medical-psychiatric testimony from the trial does not constitute a denial of due process since the Supreme Court of California has ruled that the evidence was irrelevant as to any elements of the crime charged under California law.

III.

The allegation that the trial jury was prejudiced by a certain remark of the trial judge does not present a federal question.

ARGUMENT.

I.

PETITIONER HAS WAIVED THE ALLEGED ERRORS BY HIS FAILURE TO RAISE THESE QUESTIONS ON HIS APPEAL TO THE CALIFORNIA SUPREME COURT. PETITIONER HAS NOT EXHAUSTED HIS STATE REMEDIES.

Petitioner waived the matters raised in the present petition by his failure to follow the established procedural rule in California which requires matters to be raised on appeal or be deemed waived. (*In re Dixon,* 41 Cal. 2d 756; *In re McInturff,* 37 Cal. 2d 876 [236 Pac. 2d 574]; *In re Connor,* 16 Cal. 2d 701 [108 Pac. 2d 10]. Cf. *Brown v. Allen,* 344 U.S. 443, 505.) The California Supreme Court in the case of *In re Dixon,* 41 Cal. 2d 756, 759, stated that "habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction."

Petitioner was granted an appeal from his conviction to the California Supreme Court; however, no federal constitutional questions were raised on the appeal. (*People v. Rupp,* 41 Cal. 2d 371, 377.)

Certainly, the California procedural rules that does not permit the writ of habeas corpus to be used as a substitute for an appeal does not violate due process. Indeed, federal courts follow the same rule that the writ of habeas corpus cannot be used to perform the function of an appeal. (*Sunal v. Large,* 332 U.S. 174; *Goto v. Lane,* 265 U.S. 393, 402; *Riddle v. Dyche,* 262 U.S. 333; *Craig v. Hecht,* 263 U.S. 255, 277; also, see *Dusseldorf v. Teets,* 209 Fed. 2d 754.)

Petitioner cannot exhaust his state remedies by the simple expedient of wilfully or negligently failing to present a question in the proper manner and at the proper time to the state court.

The orderly, equal, and just administration of criminal law requires that petitioners be required to raise all objections at the earliest possible moment. He should not be permitted to reserve a case for later use.

Indeed, it is well-settled that there can be no exhaustion of state remedies until there has been submitted a petition that conforms to state procedural requirements.

Buchanan v. O'Brien, 181 Fed. 2d 601 (1st Cir. 1950);

Willis v. Utecht, 185 Fed. 2d 810 (8th Cir., 1950);

United States ex rel. Calvin v. Claudy, 95 Fed. Supp. 732 (D.C., 1951).

The United States Supreme Court has stated this rule in the case of *Brown v. Allen,* 344 U.S. 443, at 458, as follows:

" . . . So far as weight to be given to the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. A fortiori, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed."

II.

THE ALLEGED EXCLUSION OF CERTAIN MEDICAL-PSYCHIATRIC TESTIMONY FROM THE TRIAL DOES NOT CONSTITUTE A DENIAL OF DUE PROCESS SINCE THE SUPREME COURT OF CALIFORNIA HAS RULED THAT THE EVIDENCE WAS IRRELEVANT AS TO ANY ELEMENTS OF THE CRIME CHARGED UNDER CALIFORNIA LAW.

Appellant alleges that he was denied the right to produce evidence of his mental state at the time of the commission of the crime, which evidence was designed to negate any specific intent on his part to commit the crime charged.

It is true that appellant offered certain expert testimony to disprove that he had a certain specific intent. This testimony was rejected and an offer of proof was made. Petitioner's appeal to the Supreme Court of California largely centered on this point. The Supreme Court of California held that the evidence was properly rejected because under the law of California the specific intent which appellant sought to disprove was not in issue. See *People v. Rupp,* 41 Cal. 2d 371, 379, et seq.

The courts of California define the elements of the crime of murder. Appellant's offered testimony was not relevant to any of those elements. The question involved is purely a matter of state law, specifically resolved by the highest court of the state.

III.

THE ALLEGATION THAT THE TRIAL JURY WAS PREJUDICED BY A CERTAIN REMARK OF THE TRIAL JUDGE DOES NOT PRESENT A FEDERAL QUESTION.

The appellant alleges that a certain remark made by the trial judge was prejudicial. The remark was held to be proper by the California Supreme Court, 41 Cal. 2d 371, 382. Manifestly, no federal question is presented. (*United States, ex rel. Bongiorno v. Ragen,* 7th Cir. 1945, 146 Fed. 2d 349; *United States, ex rel. Carr v. Barton,* 2d Cir. 1949, 172 Fed. 2d 419.)

Dated, San Francisco, California,
January 13, 1956.

Respectfully submitted,

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No. 14864

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK DAVID WINGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK DAVID WINGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California, adjudging the appellant to be guilty of two counts of an indictment charging him with conspiracy to commit offenses against the United States in violation of Section 371 of Title 18, United States Code [T. 1-3],[1] and with counselling, inducing, and procuring another to counterfeit obligations and securities of the United States in violation of Section 471 of Title 18, United States Code [T. 3-4].

The violations are alleged to have occurred in Los Angeles County, California, and within the Central Division of the Southern District of California [T. 2-3].

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[1]Reference to the Clerk's Transcript of Record are by the letter T and the page number; references to the Reporter's Transcript of Proceedings are by the letter R followed by the page number.

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

Statement of the Case.

The appellant was convicted in the United States District Court for the Southern District of California, on each of two counts of an indictment filed in said District Court on May 4, 1955 [T. 6]. Trial by jury was waived and trial was by the court [T. 9].

The indictment was in five counts, but appellant was named only in Count One and Count Two. Count One charged the appellant and three others with conspiring to commit offenses against the United States in violation of Section 371 of Title 18, United States Code; and Count Two charged appellant with counseling, inducing, and procuring another to counterfeit obligations and securities of the United States, in violation of Section 471 of Title 18, United States Code [T. 1-4].

More particularly, Count One charged that Leo Duncan Hallak, Fred H. Shire, Thomas E. Opitz and appellant agreed, confederated, and conspired together, with intent to defraud, to falsely make, forge and counterfeit obligations and securities of the United States, namely: counterfeit $10.00, $20.00 and $50.00 federal reserve notes, more particularly described in the indictment. Four overt acts were alleged. Appellant was named in only one of them (overt act No. 1); it was never proved. According to the indictment, defendant Fred H. Shire was to make the counterfeit notes and he, together with the other

defendants, was to sell and distribute them in Los Angeles County, California, and elsewhere.

Count Two charged that on or about July 1, 1954, defendant Fred H. Shire, with intent to defraud, made a quantity of counterfeit $10.00, $20.00 and $50.00 federal reserve notes and that appellant counselled, induced and procured Shire to commit that offense.

At the conclusion of the Appellee's case [T. 16; R. 261 ff.], appellant moved the Court, pursuant to Rule 29, Federal Rules of Criminal Procedure, for a Judgment of Acquittal. The motion was denied [T. 17; R. 267].

The Court found appellant guilty of Counts One and Two [T. 23, 28; R. 540]. On July 11, 1955, the Court sentenced appellant to imprisonment for five years for the offense charged in Count One of the Indictment and to imprisonment for seven years for the offense charged in Count Two of the Indictment, said periods to commence and run concurrently [T. 28-29].

Notice of Appeal was filed on July 19, 1955 [T. 31-32]. The appellant has been confined continuously since his conviction [T. 23], and is now confined.

Statement of Facts.

The Facts of the Case in General.

At about 9:00 p.m. on Monday evening, February 7, 1955, at Patmar's Drive-In, El Segundo, California, Secret Service Agent Victor D. Carli was introduced to co-defendants Fred H. Shire and Thomas E. Opitz by informers Thomas Madray and Harry (Jack) Hall. Madray introduced Carli, saying, "This is Vic. He is the man that has the money to buy the counterfeit notes" [R. 31-32]. Discussion followed between Carli, Shire,

and Opitz as to the details of a proposed sale [R. 32] and finally Carli agreed to buy $140,000.00 worth of notes for $12,000.00.

The group then obtained a room in the Del Mar Hotel and Opitz and Shire left to obtain the counterfeit money. In about 45 minutes, Shire and Opitz returned with a carton which they said contained $150,000.00 in counterfeit $50.00, $20.00 and $10.00 notes [R. 33-35]. Carli then left the group, saying that he was going to call the man who was going to bring the money. Carli soon returned, and after a few minutes Secret Service Agent Gopadze arrived and Carli introduced him to Shire and Opitz, who were identified as the sellers. Just then a group of police officers arrived and placed all of those present, namely: Shire, Opitz, Carli, Gopadze, Madray and Hall, under arrest [R. 35, 49].

At about 2:00 A. M., on February 8, 1955, a few hours after the arrest, Shire told Secret Service Agents Carli and Gopadze that he, Shire, had made the negatives and plates, had purchased the paper and the ink, and had printed the counterfeit money himself. He said that, after printing the money, he had cut up the plates and negatives and had flushed them down the sewer [R. 41-44, 50]. Shire later told the agents that he had printed about $200,000.00 in counterfeit notes, had destroyed about $50,000.00, given about $4,000.00 to co-defendant Hallak, and had sold the remainder to Carli on the night of the arrest [R. 45].

On February 8, 1955, Shire also told a deputy sheriff that he had printed counterfeit currency [R. 58]; and he showed agents Carli and Gopadze where he had printed and stored the counterfeit notes and destroyed the negatives and plates [R. 51].

The counterfeit notes sold to Agent Carli by defendants Shire and Opitz on February 7, 1955, were found to be the same as some counterfeit notes which had been recovered from defendant Leo Duncan Hallak in September, 1954 [R. 29-31]. On the evening of September 9, 1954, defendant Hallak, who had been drinking [R. 15], struck up a casual conversation with a motorcycle operator, Francis Wayne Crow [R. 12-13]. After a time Hallak and Crow went to Hallak's house, where Hallak showed Crow some paper money in denominations of $10.00, $20.00 and $50.00 [R. 17], which Crow claimed was "phoney." This angered Hallak, who drew a revolver and demanded that Crow tell him why the money looked "phoney." He also had Crow put one of the bills in the oven, where it burned. Crow was held in Hallak's house for a couple of hours, after which he and Hallak started to leave the house. Crow then took advantage of an opportunity to get away from Hallak and, when he reached a telephone, he called the police [R. 14-15]. After the police arrived at Hallak's house, they and Hallak found a burned piece of a bill. Crow next saw Hallak on the following evening, September 10, 1954, in the Firestone Substation of the Sheriff's Office [R. 21].

After his arrest, Hallak was interviewed by Secret Service Agent Carli, and on September 14, 1954, at Hallak's house, Hallak withdrew two $20.00 notes and two $10.00 notes from a rock beneath the house and surrendered them to Agent Carli [R. 30].

On September 26, 1954, Ralph Brees, of Long Beach, California, found about $3,971.00 worth of paper money near his house, and turned it over to the police [R. 22-26, 90-92], who in turn gave it to Secret Service Agents

[R. 28, 92]. Agent Carli recognized this money as similar to the notes he had received from Hallak [R. 29]; and on September 27, 1954, Hallak admitted to Carli that the notes found by Mr. Brees were some which he, Hallak, had secreted [R. 38]. He said that he obtained them from "Blackie" [R. 39]. Sometime in February, 1955, after the arrest of Shire and Opitz, Hallak, who was still under arrest, told Carli that he had bought his counterfeit notes from Fred Shire [R. 38].

At the trial Madray, the informer, testified for the Government that he knew all of the defendants [R. 94-96] and that in about late May, 1954, he told defendant Opitz that he knew where some paper was to be had and Opitz told him to "go ahead" [R. 109]. Madray also testified that in late May, 1954, defendant Opitz introduced him to defendant Shire [R. 110] and that Opitz told Madray that Shire could explain to Madray about the paper. Opitz then told Madray that Shire needed $250.00 for his family and Madray told Opitz that he wouldn't give it to Shire but he would give it to Opitz because he had known him longer [R. 111]. The next day, according to Madray's testimony, Opitz came to the Trade Winds Cafe and met Madray and Madray gave him the $250.00. Nothing was said. Madray then ". . . went out in front to the phone booth" [R. 112].

Madray also testified that a few days later Opitz met him and gave him a creased $100.00 bill and asked Madray to obtain a new one because that one wouldn't photograph, since the crease showed up in the proof [R. 113]. Madray further testified that about three weeks later (which would be about June 25, 1954), de-

fendant Hallak gave him an envelope with a $50.00 bill in it and told him that he could have them in lots of $10,000.00 or more [R. 114-115].

Madray then testified that he left the vicinity at about that time [R. 115] and had no further contact with the defendants until January, 1955, when he telephoned to Opitz [R. 118] and the latter said that he had $150,000.00 in counterfeit money [R. 119-120] and asked if Madray could do anything with it. Madray said that he would shop around and see [R. 120]. According to Madray's testimony, about a month later Madray met defendant Shire in Pershing Square, Los Angeles [R. 120], and Shire said that they wanted $15,000.00 for the money [R. 121]; Madray replied that he could get them $12,-000.00. The next evening Madray telephoned Opitz several times [R. 122] and told him that he had a buyer with cash and a meeting with Opitz was arranged [R. 125]. Madray and the buyer couldn't keep their appointment with Opitz, so Madray called Opitz again and arranged a meeting for Monday night at Patmar's in El Segundo and a motel. On Monday night, Secret Service Agent Carli picked up Madray at 8:00 P. M., and they went to Patmar's [R. 126], where they waited for about 15 minutes before Opitz and Shire drove up. Carli, Shire and Opitz discussed the price [R. 127]. A motel room was then rented and the group waited there until a man came with the money [R. 128]. Shortly afterwards the police arrived and Shire, Opitz, Madray, Harry Hall, Carli and Gopadze were arrested [R. 129].

Another Government witness, Kay Yoshida, an order filler for Kelley Paper Company, testified that he knew both defendant Fred Shire and Mrs. Shire [R. 191, 193, 206-207, 220], who had done business with Kelley Paper

Company for about two years [R. 218-220, 366] and had made many purchases [R. 207, 218-220, 366]. Mr. Yoshida testified that on August 23 and August 26 (apparently 1954), Shire & Shire had purchased 1,000 sheets of 100% rag paper from Kelley [R. 192]. The sheets were 22 inches wide by 34 inches long. The paper purchased by Shire & Shire calipered the same as the counterfeit notes recovered in September, 1954, and in February, 1955 [R. 203-205]. The fact meant only that the paper was 20-lb. paper and had no other significance [R. 213].

The Only Evidence as to Appellant Winger Was as Follows.

At the trial Madray, the informer, testified that in early May, 1954, in the office of the Trade Winds, Madray, Opitz and Winger had a conversation in which Winger suggested ". . . that I (meaning Madray) go to Sonora, Mexica, if we could get some counterfeit money and buy gold with it" [R. 97, 101]. Madray testified he told them he would do so and they discussed the amount and Madray told them that he could purchase any amount, a million dollars worth [R. 101]. Madray also testified that "Winger said at the time that if we could get such money it would be a good idea to do so" [R. 102].

Madray further testified that late in May, 1954, at the Trade Winds, Winger and Madray [R. 104] spoke of paper to print the money on and Madray said that he might be able to make a contact for it [R. 106, 108]. At the end of May or first of June, 1954 [R. 111], according to Madray, Winger was present when Madray gave Opitz $250.00; nothing was said, and Madray immediately ". . . went out in front" [R. 112].

At the trial appellant Winger stipulated ". . . that at one time Mr. Hallak and Mr. Winger did live briefly together" [R. 70]. Deputy Anderson also testified that on September 22, 1954, Winger mentioned that he had lived ". . . out there." No address was given [R. 75].

On September 23, 1954, Winger went to a substation of the Sheriff's Office and obtained and gave receipts for [R. 160] some dishes in containers bearing a Minneapolis address [R. 169], which had been picked up at Hallak's home in early September [R. 161]. Winger told the Deputy that a couple of wool blankets and a couple of fishing reels were missing. The Deputy obtained them and release them to Winger, who receipted for them [R. 165-166]. Winger told the Deputy that he had stayed with Hallak on occasion [R. 165] and that the dishes were wedding gifts which had been sent to him and his wife [R. 169]. Some female clothing which belonged to his wife was also returned to him [R. 169].

The appellant took the witness stand and testified in his own behalf [R. 312]; he denied his guilt of the offenses charged [R. 323, ff.].

Winger also testified that ". . . Mr. Hallak lived in Compton and I lived with him about approximately three weeks while my wife was back East" [R. 325]; this was about August 10th to August 29th [R. 326, 356-357].

The appellant further testified that he first met defendant Shire in the summer of 1954 [R. 332], but for about six months before that time [R. 334] Shire had been printing some advertising leaflets [R. 333] for him in connection with the operation of appellant's business, a restaurant and bar known as "Trade Winds" [R. 324-325].

Specifications of Error.

I.

The District Court erred in denying appellant's motion for a judgment of acquittal at the close of the evidence offered by the Government, for the reason that there was insufficient evidence to sustain the conviction of appellant on either of the counts charged against him in the indictment [T. 16-17; R. 261-267].

II.

The District Court erred in not acquitting appellant on each of the two counts in which he was charged in the indictment, for the reason that the evidence was insufficient to sustain a judgment of conviction on either of such counts.

ARGUMENT.

Specification of Error I.

The District Court Erred in Denying Appellant's Motion for a Judgment of Acquittal at the Close of the Evidence Offered by the Government, for the Reason That There Was Insufficient Evidence to Sustain the Conviction of Appellant on Either of the Counts Charged Against Him in the Indictment. [T. 16-17; R. 261-267.]

Those portions of Rule 29(a) of the Federal Rules of Criminal Procedure which are pertinent to this discussion provide:

> ". . . The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . ."

This rule has been interpreted to mean that:

> ". . . a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. . . . In a given case, particularly one of circumstantial evidence, that determination may depend upon the

difference between pure speculation and legitimate inference from proven facts."

Curley v. United States (C. A. D. C., 1947), 160 F. 2d 229, 232, cert. den. 331 U. S. 837.

See also:

Remmer v. United States (9 Cir., 1953), 205 F. 2d 277, 287-288.

In making the distinction between "pure speculation," on the one hand, and "legitimate inference from proven facts," on the other (*Curley v. United States, supra*) one must always keep foremost in mind the well settled principle that an inference cannot be predicated upon another inference, a presumption cannot be superimposed upon another presumption, in order to reach a factual conclusion.

Sapir v. United States (10 Cir., 1954), 216 F. 2d 722;

Direct Sales Co. v. United States (1943), 319 U. S. 703, 711;

Simon v. United States (6 Cir., 1935), 78 F. 2d 454, 456.

As to Count One.

Count One of the indictment charges the appellant and three others with agreeing, confederating, and conspiring together with intent to defraud, to falsely make, forge and counterfeit obligations and securities of the United States, in violation of the conspiracy statute, Section 371, Title 18, United States Code.

The pertinent part of that statute reads:

"If two or more persons conspire . . . to commit any offense against the United States, . . .

and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

A. The Gist of the Offense of Conspiracy Is the Agreement.

It has long been settled that:

". . . a conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means . . . It is a partnership in criminal purposes. The gist of the crime is the confederation or combination of minds.

"A conspiracy is constituted by agreement, it is, however, the result of the agreement and not the agreement itself. No formal agreement between the parties is essential to the formation of the conspiracy, for the agreement may be shown 'if there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.' *Fowler v. U. S.* (C. C. A. 9), 273 F. 15, 19.

* * * * * * * *

". . . *an accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act, he does not violate the statute unless he joined in the agreement.*" (Emphasis added.)

Marino v. United States (9 Cir., 1937), 91 F. 2d 691, 693-695.

The above-quoted opinion of this court was cited by the Supreme Court in *United States v. Falcone, et al.*

(1940), 311 U. S. 205, 210, 85 L. Ed. 128, 61 S. Ct. 204, where that court said:

> "The gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *Pettibone v. U. S.,* 148 U. S. 197; *Marino v. U. S., supra; Troutman v. U. S.,* 100 F. 2d 628; *Beland v. U. S.,* 100 F. 2d 289; *cf. Gebardi v. U. S., supra.* Those having no knowledge of the conspiracy are not conspirators, *U. S. v. Hirsch,* 100 U. S. 33, 34; *Weniger v. U. S.,* 47 F. 2d 692, 693; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of the conspiracy to which the distiller was a party but of which the supplier had no knowledge."

B. In Order to Constitute One a Party to a Conspiracy It Must Be Shown That He Has Intentionally Participated in the Transaction With a View to the Furtherance of the Common Design and Purpose.

We have seen (*United States v. Falcone; Marino v. United States, supra*) that the gist of the offense of conspiracy is the agreement and that those having no knowledge of the conspiracy are not conspirators. It is self-evident that if the gist of the offense is the agreement then mere knowledge, acquiescence, or approval of the act, without co-operation or agreement to cooperate, is not enough to constitute one a party to a conspiracy. In order to show that a person is a party to the conspiracy it is necessary to establish that there is "*concert of action,* all the parties *working together understand-*

ingly, with a single design for the accomplishment of a common purpose." (Emphasis added.)

Marino v. United States (9 Cir., 1937), 91 F. 2d 691, 694.

The United States Court of Appeals for the Tenth Circuit has recently held that:

"It is obvious that mere association with conspirators in matters not connected with the unlawful undertaking does not make one a conspirator, even though he may know that an unlawful undertaking is in the making by those with whom he associates . . . It is only when he associates with the conspirator *for the purpose of committing a public offense* that he becomes a member of the conspiracy."

Butler v. United States (10 Cir., 1952), 197 F. 2d 561, 564-565.

See also:

Van Huss v. United States (10 Cir., 1952), 197 F. 2d 120;

15 C. J. S. 1062.

The distinction between mere knowledge and acquiescence in the fact that a conspiracy exists and that combination of knowledge, intent, and cooperation which is essential to constitute one a member of a conspiracy was described by the Supreme Court in *Direct Sales Co. v. United States* (1943), 319 U. S. 703. In that case the petitioner was a drug manufacturer doing a mail order business in Buffalo, New York. Among its customers was a Dr. Tate in Calhoun Falls, South Carolina, a town of 2,000 people. Dr. Tate dispensed illegally vast quantities of morphine purchased from petitioner. Petitioner was indicted along with Dr. Tate on a charge of con-

spiracy and was convicted and appealed. The opinion of the Supreme Court stated, at page 705, that the salient facts were that Direct Sales sold morphine to Dr. Tate in such quantities, so frequently, and over so long a period of time, that it must have known that Dr. Tate could not dispense the amounts received in lawful practice and that Dr. Tate was therefore distributing the drug illegally. Not only was this true, but Direct Sales *actively stimulated* Dr. Tate's purchases.

The evidence showed that the average physician in the United States does not require more than 400 one-fourth grain tablets of morphine annually for legitimate use. Dr. Tate was buying an average of 5,000 to 6,000 one-half grain tablets per month from petitioner. Petitioner gave discounts of 50% on quantity sales of narcotics and listed them for sale in units of 500, 1,000, or 5,000 tablets.

The petitioner relied upon the *Falcone* case, on the theory that he could not be a party to the conspiracy merely because he supplied goods to an illicit merchant.

The Court distinguished the *Falcone* case, at page 711, saying:

> "This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote, and cooperate in it. This intent, when given effect by overt act, is the gist of the conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist. *U. S. v. Falcone,* . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. *Ibid.* This,

because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes."

After discussing the petitioner's sales promotion in the form of discounts, etc., in the bulk sales of morphine, the Supreme Court went on to say, at page 713:

> "When the evidence discloses such a system, working in prolonged cooperation with a physician's unlawful purpose to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. *The step from knowledge to intent and agreement may be taken.* There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. And there is informed and interested cooperation, stimulation, instigation. There is also a 'stake in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy. *U. S. v. Falcone,* 109 F. 2d 579, 581; and compare *Backun v. U. S.,* 112 F. 2d 635, 637; *U. S. v. Harrison,* 121 F. 2d 930, 933; *U. S. v. Pecoraro,* 115 F. 2d 245, 246." (Emphasis added.)

See also:

> *Samuel v. United States* (9 Cir., 1948), 169 F. 2d 787.

In the case at bar we find that the state of the evidence as to appellant at the time of making the Motion for Judgment of Acquittal was as follows:

> 1. According to the testimony of Madray, the informer, in early May, 1954, the appellant suggested

that he (Madray) go to Sonora, Mexico, "if we could get some counterfeit money and buy gold with it" R. 97, 101]. Madray said he would do so and could purchase any amount, a million dollars worth [R. 101]. Madray also testified that "Winger said at the time that if we could get such money it would be a good idea to do so" [R. 102].

2. According to the testimony of Madray, in late May, 1954, Winger and Madray spoke of paper to print the money on and Madray said that he might be able to make a contact for it [R. 106, 108].

3. At the end of May or first of June, 1954, according to Madray, Winger was present when Madray gave Opitz $250.00; nothing was said and Madray immediately went "out in front" [R. 111-112].

4. Winger and defendant Hallak had lived briefly together [R. 70, 75].

5. In late September, 1954, Winger went to a substation of the Sheriff's Office and obtained and receipted for [R. 160] some personal effects which had been found at Hallak's house [R. 161] and which consisted of some containers of dishes with a Minneapolis address which were wedding gifts to appellant and his wife [R. 169], some female clothing [R. 169], and a couple of blankets and fishing reels [R. 165-166].

The first of these items of evidence certainly is not the substantial evidence necessary to constitute one a member of a conspiracy. The plain words of the statements attributed to Winger necessarily imply that, at most, this was mere speculation and talk. The only possible inference is that, if ever there was a conspiracy, no conspiracy then

existed; the language negatives the possibility of a present conspiracy. In this connection it is significant that in the indictment the grand jury charged that the conspiracy began on or about July 1, 1954 [T. 1].

The second item is in the same category as the first. Furthermore, it is of doubtful credibility, since the indictment charges that Fred M. Shire was a party to the conspiracy and the Government's evidence showed that he was in the printing business and that he had been buying paper from the Kelley Paper Company for about two years [R. 218-220, 366] and had made many purchases [R. 207, 218-220, 366]. Clearly, he would not have needed the assistance of Madray to locate paper.

The third item proves absolutely nothing as to a connection between Winger and a conspiracy. Madray's own testimony was that he was giving the money to Opitz for the use of Shire, who needed the money for his family [R. 110-111].

The fourth and fifth items prove only that Winger lived briefly with Hallak and that he had left some odds and ends of his personal effects in Hallak's house. It is submitted that these items of evidence are not sufficient, even when taken together, to show that (1) an agreement, a confederation or combination of minds which is the gist of the crime of conspiracy, existed at all, or (2) if it did exist, that appellant Winger had "joined in the agreement."

Marino v. United States (9 Cir., 1937), 91 F. 2d 691, 694-695;

United States v. Falcone (1940), 311 U. S. 205, 210;

Direct Sales Co. v. United States (1943), 319 U. S. 703, 713.

The rule to be followed in passing on a motion for judgment of acquittal, as we have seen, is that the court must determine whether there is evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, and if there is not, the motion must be granted. "In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts."

Curley v. United States (C. A. D. C., 1947), 160 F. 2d 229, 232.

In order to deny the motion of judgment of acquittal as to Count One of this indictment, it would be necessary to start with the above facts and then to infer:

1. That an agreement, or confederation and combination of the minds, to commit an offense, existed at the time of the facts in question.

(For such an agreement is the gist of the offense of conspiracy.

Marino v. United States, 91 F. 2d 691, 694;

United States v. Falcone, 311 U. S. 205, 210.)

2. That appellant Winger had knowledge of the fact of that agreement or conspiracy.

(Those having no knowledge of the conspiracy are not conspirators.

Direct Sales Co. v. United States, 319 U. S. 703;

United States v. Falcone, 311 U. S. 205, 210.)

3. That having such knowledge appellant Winger joined in the agreement or conspiracy.

(A person does not violate the conspiracy statute unless he joins in the agreement.

Direct Sales Co. v. United States, 319 U. S. 703;

Marino v. United States, 91 F. 2d 691, 695.)

It is submitted that here we have, *at most,* suspicion, carelessness, indifference and lack of concern. The state of the evidence does not meet the true requirements of membership in a conspiracy as set forth by the Supreme Court in *Direct Sales Co. v. United States,* 319 U. S. 703, where the court said that to take the step from knowledge to intent and agreement one must have more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. We do not here find, as was found in the *Direct Sales Co.* case, the "informed and interested cooperation, stimulation, instigation."

As was said in the *Direct Sales Co.* case (319 U. S. 703, 711):

> "Without the knowledge, the intent cannot exist . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case (*United States v. Falcone*) was called a dragnet to draw in all substantive crimes."

See also:

Krulewitch v. United States (1940), 336 U. S. 440, 93 L. Ed. 790, 795.

The case at bar compares with *Simon v. United States* (6 Cir., 1935), 78 F. 2d 454, 456, where a conviction of defendant Viola of conspiracy to violate the counterfeiting laws was reversed.

There the defendant Viola was seen in an automobile with the other defendants shortly before the sale of counterfeit notes was consummated. The court held:

> ". . . There is nothing, however, to indicate that Viola knew the purpose of the expedition, or in any way contributed to it. He was not present when the sale was made, nor during the prior negotiations. To infer that he was a party to the conspiracy, or abetted the commission of the substantive offenses which were its object, is to establish a fact by building one inference upon another. This does not constitute substantial evidence to submit to a jury."

As to Count Two.

Count Two charged that on or about July 1, 1954, defendant Fred Shire, with intent to defraud, did falsely make, forge, and counterfeit obligations and securities of the United States, and that appellant Jack David Winger did counsel, induce, and procure the commission of said offense.

The evidence before the court as to this offense at the time of the motion for judgment of acquittal was identical with that described in the argument relative to Count One, above. It is submitted that the evidence as to this offense was not only insufficient to permit the court to deny the motion but that *there was no evidence at all.*

At the time of the ruling on the motion there was no evidence, of any type whatsoever, that appellant Winger had ever seen, known, known of, or communicated with defendant Shire at any time, about anything, or at all.

There are no facts to give rise to a question of fact or law and for that reason it is not possible to present a detailed argument. It is to be noted, however, that the proof of a conspiracy does not necessarily prove the commission of a substantive offense, and that the proof of a substantive offense does not necessarily prove a conspiracy.

Samuel v. United States (9 Cir., 1948), 169 F. 2d 787, 794;

United States v. Lutwak (7 Cir., 1952), 195 F. 2d 748, 753;

Peterson v. United States (9 Cir., 1921), 274 Fed. 929, 930.

Specification of Error II.

The District Court Erred in Not Acquitting the Defendant on Each of the Two Counts in Which He Was Charged in the Indictment, for the Reason that the Evidence Was Insufficient to Sustain a Judgment of Conviction on Either of Such Counts.

At the conclusion of all of the evidence, the only evidence before the court, in addition to that which was considered in the argument as to Specification of Error No. I, was the following:

1. Appellant Winger testified in his own behalf and denied his guilt as to the offenses charged [R. 312, 323 ff.].

2. Defendant Opitz denied that he had ever been present when Winger or Madray discussed counterfeit money or going to Mexico to buy gold with counterfeit money [R. 279], or that he had ever conversed with Winger about counterfeit money [R. 281].

3. Defendant Shire denied that he had ever conversed with appellant Winger concerning the making or selling or passing or anything concerning counterfeit money [R. 432].

4. Appellant Winger testified that ". . . Mr. Hallak lived in Compton and I lived with him about approximately three weeks while my wife was back East" [R. 325]; this was about August 10th to 29th [R. 326, 356-357].

5. Winger testified that he first met defendant Shire in the summer of 1954 [R. 332] but for about six months before that time [R. 334] Shire had

been printing some advertising leaflets [R. 333] for him in connection with the operation of appellant's business, a restaurant and bar known as the Trade Winds [R. 324-325].

6. Shire testified that he had been a printer and lithographer for between eleven and twelve years [R. 434]. He denied that the counterfeit notes were made by him on his own machine or any other machine [R. 434-435].

It is submitted that the evidence before the Court at the close of the case did not strengthen the case against appellant on either count. On the contrary, the evidence introduced during the defense further demonstrated the insufficiency of the evidence to support a judgment of conviction on either count as to appellant.

Conclusion.

The case against this appellant was based entirely upon circumstantial evidence. Appellant was shown to have been acquainted with an informer and with one member of a conspiracy to violate the counterfeiting laws, namely, Opitz. The strongest evidence, if believed, would show that he had joined in a conversation in which it was speculated that *if* the parties had counterfeit money, it *would* be a good idea to buy gold with it in Mexico. Some of appellant's personal effects were found in the home of one of the defendants, who, the evidence showed, had possession of some counterfeit money approximately ten days after appellant had left. Appellant had stayed with such defendant temporarily, while appellant's wife was on vacation.

In order to connect the appellant with the conspiracy, it would be necessary to infer from the above that (1) a conspiracy then existed; and (2) appellant knew of that conspiracy; and (3) knowing of the conspiracy, he joined into the agreement. The Government failed to prove these things. Also, there is absolutely no evidence whatsoever of his participation in the substantive offense charged in Count 2.

The appellant respectfully submits that the judgment of the District Court should be reversed.

Respectfully submitted,

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No. 14864

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK DAVID WINGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK DAVID WINGER,

Appellant,

vs.

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Appellee.

APPELLEE'S BRIEF.

I.
JURISDICTIONAL STATEMENT.

This is an appeal from a Judgment of the United States District Court for the Southern District of California, adjudging the appellant to be guilty of two counts of an Indictment charging him with conspiracy to commit offenses against the United States, in violation of Section 371 of Title 18, United States Code [T. 1-3], and with counselling, inducing, and procuring another to counterfeit obligations and securities of the United States, in violation of Section 471 of Title 18, United States Code [T. 3-4].

The violations are alleged to have occurred in Los Angeles County, California, and within the Central Division of the Southern District of California [T. 2-3].

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the Judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.
STATEMENT OF THE CASE.

Appellee adopts the statement of the case as set forth in appellant's opening brief with the following additions: The overt acts numbered 2, 3 and 4 of Count One of the Indictment were proved. Appellant, after denial of his motion for acquittal at the close of the Government's case [T. 17], proceeded to introduce evidence on his own behalf [T. 18-19], and thereafter failed to renew his motion for acquittal under Rule 29(a) at the close of all the evidence, although he made other motions at that time [T. 23].

III.
STATEMENT OF FACTS.

Early in May, 1954, Madray, co-defendant Opitz and appellant held a conversatoin at the Trade Winds located at 334 South Market Street, Inglewood, California [R. 97-98, 100-102]. This was a night club owned by appellant [R. 313]. They discussed obtaining counterfeit money, and possible ways to dispose of it profitably. Later in May, Opitz brought co-defendant Shire, a printer, into the picture, introducing him to Madray [R.

110-111]. Appellant had already employed Shire on previous occasions for printing work [R. 324]. There was a discussion between appellant and Madray about paper which could be used for the proposed counterfeit money, which conversation took place at the Trade Winds [R. 103-108]. Other meetings of the parties to the conspiracy also took place at the same location [R. 109, 113-114].

Later on, in late June or July, 1954, in the alley behind the Trade Winds, defendant Hallak exhibited a counterfeit $50 bill to Madray, and told him that he could obtain them in $10,000 lots for a price of 20¢ on the dollar [R. 114-115]. Hallak and appellant were acquainted, according to appellant's admission on the stand [R. 314]. They lived together at Hallak's residence, according to appellant, for only three weeks during August, 1954 [R. 69, 325], but at the time of Hallak's arrest for possession of some of the counterfeit [Govt. Exs. 2 and 3] property claimed by appellant [Govt. Exs. 6 and 7] was still in Hallak's house. This included appellant's blankets, which were still on one of the beds [R. 165-166]. In addition to the property listed in Exhibits 6 and 7, some of the sheets belonging to plaintiff were still at the house [R. 169].

After Hallak's ill-fated attempt to dispose of the counterfeit and his subsequent arrest there is no evidence of renewed activity by the counterfeit ring prior to January, 1955, when Madray called Opitz about another matter [R. 119]. Opitz then mentioned he could

still obtain counterfeit money. Negotiations between Madray and co-defendants Opitz and Shire ensued. On February 2, 1955, in Pershing Square, Los Angeles, Shire told Madray that Opitz and Shire "had to talk to the person who had control of this, the say-so, as to the price of this counterfeit money" [R. 122]. Finally a meeting was held on February 7, 1955, at Pat Mar's Drive In, Imperial Highway and Sepulveda Boulevard, El Segundo, California, between the informer Hall, undercover agent Carli, Opitz, Shire and Madray [R. 127-129]. A motel room at the Del Mar Motel, located about a block and a half from Pat Mar's, was obtained to effect the transfer of the counterfeit [R. 33]. Co-defendants Opitz and Shire left the room to obtain the counterfeit bills [R. 34]. They first went to Pat Mar's where co-defendant Shire telephoned. Opitz heard him say, "Hello, hello, hello Jack," but said he did not hear the balance of the conversation [R. 492-493]. According to co-defendant Opitz, Shire later denied that he was calling Jack Winger [R. 496], but the court was entitled to disbelieve this evidence. Shire and Optiz were gone for approximately 45 minutes, and thereafter returned with the counterfeit [Ex. 4], and they both went back to the Del Mar Motel room [R. 34]. They took the counterfeit into the room and were later arrested while still there [R. 35]. The counterfeit was identical to that which Hallak had had at the time of his arrest in September, 1954 [R. 40].

IV.
ARGUMENT.

A. Appellant Failed to Renew Motion for Acquittal at Close of All Evidence, Thereby Waiving His Right to Object to District Court's Adverse Ruling at Close of Government's Case [T. 23, R. 261-267].

Appellant's specification of error No. 1 is not reviewable on appeal. He waived any right to object to the court's denial of the motion for acquittal at the close of the government's case by putting in evidence on his own behalf, and failing to renew his motion at the close of all the evidence.

Mosca v. United States, 174 F. 2d 448, 450-451 (9th Cir., 1949);

Malatkofski v. United States, 179 F. 2d 905, 910 (1st Cir., 1950).

(As to the necessity of making a motion for acquittal at the close of all evidence.)

United States v. Powell, 155 F. 2d 184 (7th Cir., 1946);

Leeby v. United States, 192 F. 2d 331, 333 (8th Cir., 1951).

Appellant was represented by experienced counsel who presented the motion for acquittal as well as other motions at the close of the government's case [T. 17], and at the close of all the evidence made motions to strike, but did not renew his motion for acquittal [T. 23].

B. Upon Failure of Appellant to Move for Acquittal at Close of All Evidence, the Insufficiency of Evidence Will Be Considered on Appeal Only as a Matter of Grace or Sound Discretion.

Appellant's specification of error No. 2 is ordinarily not reviewable on appeal by virtue of the fact that he failed to make a proper motion for acquittal at the close of all the evidence. The appellate court will consider the evidence in such a case only as a matter of grace or in its sound discretion.

Malatkofski v. United States, 179 F. 2d 905, 910 (1st Cir., 1950);

Leeby v. United States, 192 F. 2d 331, 333 (8th Cir., 1951).

C. Questions of Fact and of Credibility Are for the Trial Court.

It is well settled that the appellate court will not review questions of fact or weigh evidence, where there is any substantial and competent evidence to support a finding of guilt, that the court will take a view of the evidence most favorable to the government and will give the government the benefit of all inferences which reasonably may be drawn from the evidence.

Woodward Laboratories, Inc., et al. v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 380 (9th Cir., 1948), cert. den. 335 U. S. 853.

(The foregoing rules apply to court trials also.)

C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (9th Cir., 1952), cert. den. 344 U. S. 892;

United States v. Empire Packing Company, 174 F. 2d 16 (7th Cir., 1949), cert. den. 337 U. S. 959.

D. There Was Some Substantial Evidence to Support the Judgment of Conviction.

The finding of guilt by the court was amply supported by the evidence.

Count One: Appellant participated in the initial planning for the obtaining and use of the counterfeit [R. 97-98, 100-102, 103-108]. Much of the activity in connection with the counterfeit ring took place around his Trade Winds night club [R. 109, 113-115]. Hallak made his first attempt to dispose of some of the counterfeit bills at the Trade Winds [R. 114-115]. Hallak made the second attempt to dispose of counterfeit bills at the house in which he and the appellant then lived [R. 69-70, 165-166]. During the third attempt Shire did not have the counterfeit with him except for samples. After an agreement as to terms was reached, Shire telephoned "Jack" before he went to procure the $150,000 of counterfeit bills [R. 127-129, 492-493]. The District Court could reasonably infer that the call was to the appellant, Jack Winger. It follows that there was some substantial and competent evidence to support the judgment of conviction as to Count One.

To prove a conspiracy it is sufficient to show an agreement, and that any of the conspirators performed one of the overt acts.

Section 371, Title 18, United States Code;

Braverman v. United States, 317 U. S. 49, 53;

Marino v. United States, 91 F. 2d 691, 693-695 (9th Cir., 1937).

In considering whether or not there was an agreement, we are not tied down to the "plain words of the statements attributed to" appellant, as appellant urges on page 18 of his opening brief. The trier of facts is entitled to draw reasonable inferences from the testimony, the established facts, the exhibits, and the demeanor of witnesses, of what is said and what is omitted in testifying. It is common knowledge that conversations of persons planning criminal activities are for many reasons not models of technical precision. They are not lawyers drafting legal documents. The very nature of the persons involved and of their activities precludes such precision. For this very reason it is most important that the decision of the learned trial court, which had the opportunity to observe the witnesses' demeanor at the time they were testifying, should not be overturned too readily. This is especially true in a case, as here, where an experienced trial judge has weighed the evidence.

Count Two: There is the original conversation which took place between Madray, Opitz and appellant, in which appellant suggested obtaining and disposing of the counterfeit bills [R. 97-98, 100-102]. Shortly after that time Opitz brought Shire, the printer, into the picture [R. 110-111]. Shire had already been used by appellant for printing work [R. 324]. The question of obtaining neces-

sary paper for the counterfeit bills was discussed between Madray and appellant, and also by Madray, Opitz and Shire [R. 103-109]. The trial court has found that Shire printed the counterfeit bills [R. 540]. Finally, Shire telephoned "Jack" during the final arrangements to sell $150,000 of the counterfeit and before he procured it, on the night of February 7, 1955 [R. 492-493]. It is to be noted that the Del Mar Motel, El Segundo, is only approximately seven miles from the Trade Winds night club, Inglewood. Shire and Opitz were gone from the motel room for forty-five minutes to get the $150,000 in counterfeit [R. 34]. It follows that there was some substantial and competent evidence to support the finding of guilt on Count Two.

The appellant's attitude as to the evidence on Count Two obviously overlooks the fact that the Government does not have to show that appellant directly counselled, induced and procured Shire to make the counterfeit.

> "It is not necessary that there should be any direct communication between an accessory before the fact and the principal felon; it is enough if the accessory direct an intermediate agent to procure another to commit the felony, without naming or knowing of the person to be procured."
>
> *Morei v. United States,* 127 F. 2d 827, 830 (6th Cir., 1942);
>
> Section 2, Title 18, United States Code.

The trial court might readily infer from the facts given that Opitz brought Shire into the picture at the behest of appellant. Shire was found guilty of manufacturing the counterfeit, and he has not appealed.

V.
CONCLUSIONS.

I. The appellant waived any right to raise the two points specified on appeal by his failure to renew his motion for acquittal at the close of all the evidence.

II. The evidence was sufficient to show that a conspiracy in fact existed. The fruits of the conspiracy were in evidence in the form of approximately $154,000 of counterfeit notes. Appellant was the initial moving force in getting the counterfeit printed, as evidenced by his conversation in early May, 1954 with Madray and defendant Opitz. Appellant later discussed with Madray the subject of obtaining paper upon which to print the conuterfeit. Appellant continued in the conspiracy up to and including its unexpected and unsuccessful termination at the time of the attempted sale of the counterfeit notes to Secret Service agents.

III. The evidence was sufficient to show that appellant counseled, induced and procured defendant Shire, through the agency of defendant Opitz, to make the counterfeit notes.

The Government respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,

LLOYD F. DUNN,
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Assistant Chief,
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Attorneys for Appellee.

No. 14864

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK DAVID WINGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

CHARLES H. CARR,
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IN THE

United States Court of Appeals

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JACK DAVID WINGER,

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Appellee.

APPELLANT'S REPLY BRIEF.

I.

Federal Appellate Courts May Notice Errors and, to Prevent Serious Injustice, May Consider the Sufficiency of Evidence and Reverse a Conviction in the Absence of a Motion for Judgment of Acquittal at the Close of All of the Evidence.

The above principle has been followed by the Supreme Court of the United States and by various United States Courts of Appeals. In *United States v. Atkinson* the Supreme Court said:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or

if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."

United States v. Atkinson (1936), 297 U. S. 157, 160, 80 L. Ed. 555, 56 S. Ct. 391.

To the same effect, see:

Knight, et al. v. United States (5 Cir., 1954), 213 F. 2d 699, 700;

United States v. Jonikas (7 Cir., 1951), 187 F. 2d 240, 241;

Lockhart v. United States (4 Cir., 1950), 183 F. 2d 265, 266;

Malatkofsky v. United States (8 Cir., 1950), 179 F. 2d 905, 910.

See also:

12 Cyclopedia of Federal Procedure (3d Ed.), Secs. 51.67 to 51.69, and authorities collected there.

The spirit of the above principle is reflected in Rule 52(b), Federal Rules of Criminal Procedure, as follows:

"(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Respectfully submitted,

CHARLES H. CARR,

GEORGE E. DANIELSON,

Attorneys for Appellant.

No. 14864

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK DAVID WINGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK DAVID WINGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

To the Honorable, the United States Court of Appeals for the Ninth Circuit and to the Honorable Albert Lee Stephens, James Alger Fee and Richard H. Chambers, Judges thereof:

Comes now the appellant in the above-entitled cause, and presents this, his Petition for Rehearing of the above-entitled cause and, in support thereof, respectfully shows:

That the opinion of this Honorable Court in this case is erroneous and is contrary to law in the following particulars:

I.

The Court erred in holding that the evidence supports a finding that Appellant was an accessory before the fact.

II.

In reaching its decision this Court has misapprehended, in a material way, the nature of the conversation between Appellants Madray and Opitz.

III.

The Court erred in its opinion in that, in affirming the conviction, it permitted the trier of fact to base inference upon inference in order to reach a factual conclusion.

Preliminary Statement.

Appellant appealed from a conviction of each of two counts of an indictment charging him with (1) conspiracy to counterfeit, and (2) counselling, inducing, and procuring one Shire to counterfeit. This Court's opinion is based upon the second count only; the Court did "not reach" the conspiracy count. The conviction on the second count was sustained on the theory that Appellant was an accessory before the fact.

While the distinctions between principals, aiders and abettors, and accessories before the fact have been abrogated by statute insofar as culpability and punishment are concerned, it is still necessary to apply the common law rules in order to determine whether, in a given case, a person actually is an accessory before the fact, and, therefore, guilty and punishable as a principal. The cases so hold (*Morei v. U. S.,* 6 Cir. 1942, 127 F. 2d 827, 830-831; *U. S. v. Peoni,* 2 Cir. 1938, 100 F. 2d 401), and it is clearly implicit in the statute that this is the intent of the Congress. In the 1948 revision of Title 18, U. S. Code, Section 2(a) provided that:

> "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

It is significant that in 1951 the last portion of that section was amended to read:

> "is *punishable as a principal.*" (Emphasis supplied.)

I.

The Court Erred in Holding That the Evidence Supports a Finding That Appellant Was an Accessory Before the Fact.

The Court cites four cases in support of its holding that "an accessory before the fact can work through an intermediary as well as with him who ultimately commits the principal crime." This can be conceded. However, it does not follow that a person becomes an accessory before the fact, and therefore "punishable as a principal" (18 U. S. C. Sec. 2 (a)), simply because he is shown to have associated with a person who in turn has associated with another person who has committed the principal crime.

Here the only evidence to support the judgment of conviction for counselling Shire was a conversation of appellant with Opitz and Madray, not Shire. That conversation was that "I (Madray) go to Sonora, Mexico, if we could get some counterfeit money and buy gold with it." [R. 97, 101.]

A mere statement such as this certainly does not constitute an association with the venture of printing and possessing counterfeit money some four months later, with which appellant was in no way connected by the evidence.

In three of the cases cited by the Court, namely: *Russell v. U. S.*, 5 Cir. 1955, 222 F. 2d 197; *Turner v. U. S.*, 9 Cir. 1953, 202 F. 523, and *Collins v. U. S.*, 5 Cir. 1933, 65 F. 2d 545, the evidence was overwhelming that the defendants actively participated in the commission of the crimes; in fact, they caused the crimes to be committed. As this Court said, in the *Turner* case, the appellant ". . .

was the planner, the instigator, and the intended beneficiary of the entire scheme. . . ." In each of those cases the "intermediaries" were actually the instruments used by the defendants in committing the crimes. In two of the cases the "intermediaries" were actually paid to perform their part of the transaction.

The remaining case cited by this Court, *Morei v. U. S.*, 6 Cir. 1942, 127 F. 2d 827, presents a factual situation remarkably similar to that of the case now before the Court and it is interesting to note that in the *Morei* case the Court *reversed* the conviction.

In the *Morei* case the evidence relied upon to fasten guilt upon Dr. Platt was a conversation, preceding the commission of the crime, in which Dr. Platt gave an "intermediary" the name of Morei as a man from whom he might secure heroin to dose horses in order to stimulate them in racing. The Court then said (127 F. 2d at p. 832):

> "This is not the purposive association with the venture that, under the evidence in this case, brings Dr. Platt within the compass of the crime of selling or purchasing narcotics, either as principal, aider and abettor, or accessory before the fact."

In reaching its conclusion in the *Morei* case the Court reviewed the law as to the intent and "purposive association" necessary to make one an accessory before the fact. Adopting the language of authorities, and conceding that an accessory can act through an intermediary, the Court said (127 F. 2d at pp. 830-831):

> "A person is not an accessory before the fact, unless there is some sort of active proceeding on his part; he must incite, or procure, or encourage

> the criminal act, or assist or enable it to be done, or engage or counsel, or command the principal to do it. . . . Strictly speaking, in order to constitute one an accessory before the fact, there must exist a community of unlawful intention between him and the perpetrator of the crime."

Then, quoting from Judge Learned Hand in *U. S. v. Peoni,* 2 Cir. 1938, 100 F. 2d 401, the Court went on to say:

> ". . . all these definitions . . . (of aiders and abettors and accessories) . . . demand that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry the implication of purposive attitude toward it."

In the *Peoni* case, above, the Court of Appeals reversed a conviction under the counterfeiting laws. In that case the defendant was charged with being an accessory to the possession of counterfeit notes which were found in the possession of one who had bought them from another, who, in turn, had bought them from the defendant.

Appellant asserts that the decisions in the *Morei* and *Peoni* cases correctly state the law as to accessories, and had it been applied to the facts of the case at bar, the conviction must necessarily have been reversed. It appears that the Court must have misapprehended the evidence relating to the appellant Winger. In upholding this conviction, this Court's decision not only conflicts with the decisions of the other circuits but it also departs from the common law rules relating to accessories before the fact.

II.

In Reaching Its Decision This Court Has Misapprehended, in a Material Way, the Nature of the Conversation Between Appellants Madray and Opitz.

After stating that, "Any evidence of direct person to person contact between Winger and Shire, although they were not strangers, is rather flimsy—by itself certainly insufficient to uphold a conviction," the opinion of the Court holds that there was evidence of Winger counselling the intermediary, Opitz, in contemplation of the securing of counterfeit money and that the money was manufactured "according to the plan in which Winger originally counselled."

There is no evidence in the record in this case to support the assertion that money was manufactured "according to the plan in which Winger originally counselled." It is pointed out again that all that Winger said to Madray and Opitz (not to Shire) was "that I (Madray) go to Sonora, Mexico, if we could get some counterfeit money and buy gold with it." [R. 97, 101.] This is the only evidence upon which the Court, apparently, relied to connect appellant Winger with Shire, and it certainly does not support a conclusion that appellant was counselling the manufacture and possession of counterfeit money.

Thus it is clear that the Court has misapprehended the nature of the conversation between Appellant, Madray and Opitz and has understood it to be a "plan" for the manufacture of counterfeit money in which Appellant counselled Opitz. A careful reading of the testimony as to that conversation, in the words of the government's

own witness [R. 97-101], and as summarized in Appellant's brief at page 8 and in Appellee's brief at page 2, shows that, at most, it is mere speculation as to what *could* be done *if* the parties had some counterfeit money. In the conversation there is nothing which can be interpreted as a plan for the manufacture of counterfeit.

III.

The Court Erred in Its Opinion in That in Affirming the Conviction It Permitted the Trier of Fact to Base Inference Upon Inference in Order to Reach a Factual Conclusion.

It is settled that an inference cannot be predicated upon another inference, a presumption cannot be superimposed upon another presumption, in order to reach a factual conclusion. Inferences can be based only upon proven facts or facts of which judicial notice can be taken.

Sapir v. U. S., 10 Cir. 1954, 216 F. 2d 722;

Direct Sales Co. v. U. S., 1943, 319 U. S. 703, 711;

Simon v. U. S., 6 Cir. 1935. 78 F. 2d 454, 456;

Curley v. U. S., C. A. D. C. 1947, 160 F. 2d 229, 232.

In its opinion this Court starts with the proven fact that Winger had a conversation with Opitz in which there was speculation as to what could be done if they had some counterfeit money. From this one fact relating to Appellant, the opinion finally holds that ". . . a trier of fact was entitled circumstantially to conclude that the money was manufactured according to the plan in which Winger originally counselled."

In order to reach this conclusion (*i.e.,* inference of ultimate fact) it would be necessary for the trier of fact to make the following inferences:

(1) That there was another or further conversation between Winger and Opitz in which the manufacture of counterfeit was discussed.

(2) That in such inferred conversation Winger incited or procured or encouraged that criminal act, or assisted or enabled it to be done, or engaged or counselled or commanded the principal (or Opitz) to do it.

(3) That *as a result of Winger's inferred "counselling"* Opitz did, in fact, seek out Shire in order to have the counterfeit manufactured according to the inferred plan, and

(4) That a community of unlawful intention existed between Winger, Opitz, and Shire, and

(5) That in printing the counterfeit Shire was actuated by, and responded to, the inferred "counselling" by Winger and Opitz.

Appellant submits that to permit the reaching of a factual conclusion in this manner is ". . . to establish a fact by building one inference upon another. This does not constitute substantial evidence to submit to . . ." a trier of facts. (*Simon v. U. S.,* 6 Cir. 1935, 78 F. 2d 454, 456.)

Conclusion.

It is respectfully submitted that the decision of this Honorable Court is erroneous in the several particulars heretofore set forth, to the detriment and prejudice of the Appellant in this case, and that Appellant is justly entitled to a reconsideration and to a rehearing in order

that he may fully and completely present the errors complained of, and that upon further consideration this Court may set aside the conviction of Appellant on each count of the indictment.

Respectfully submitted,

CHARLES H. CARR,
GEORGE E. DANIELSON,
Attorneys for Appellant.

Certificate of Counsel.

We, counsel for the above-named appellant, do hereby certify that in our judgment the foregoing Petition for Rehearing is well founded, fully justified, and that it is not interposed for delay.

CHARLES H. CARR,
GEORGE E. DANIELSON,
Attorneys for Appellant.

No. 14,865

IN THE

United States Court of Appeals

For the Ninth Circuit

WESLEY LEON COLBERT,
Appellant,

vs.

PAUL J. MADIGAN, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,865

IN THE

United States Court of Appeals

For the Ninth Circuit

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Appellant,

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PAUL J. MADIGAN, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

This Court has jurisdiction of this appeal under Sections 2241 and 2253 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant is a prisoner in the United States Penitentiary at Alcatraz, California. On May 13, 1955 appellant petitioned for a writ of habeas corpus on the ground that respondent had misinterpreted the terms of the judgment under which he was committed. This judgment order, insofar as pertinent here, reads as follows:

> "It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years, said sentence to run consecutively with the sentence imposed by this court in criminal action No. 15127."

An order to show cause was issued on May 23, 1955. Subsequently, respondent made return to this order and a hearing was held before the Honorable Edward P. Murphy, United States District Judge. Judge Murphy discharged the order to show cause and denied the petition for a return of habeas corpus. Appeal was timely made to this Court.

OPINION OF THE COURT BELOW.

"This is a petition for a writ of habeas corpus, alleging illegal detention because of the expiration of the sentence. Petitioner was convicted in the United States District Court for the Eastern District of Arkansas, Western Division in two criminal actions, No. 15127 and No. 15298. On October 15, 1951, petitioner was sentenced to a term of five years in action No. 15127 and to an additional term of five years in action No. 15298. On the order in action No. 15298, the sentencing court said:

> 'It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years, said sentence to run consecutively with the sentence imposed by this court in criminal action No. 15127.'

"Petitioner contends that since the sentencing court did not specify the date of commencement of the second sentence, and used the words 'consecutively with', the two sentences should be construed as concurrent. This contention is invalid. It is the clear rule in this Circuit that 'consecutively with' is equivalent to 'consecutively to'. *Butterfield v. Wilkinson,* 215 F.2d 320 (9th Cir. 1954). There is no ambiguity in the sentence here. It is plainly meant to be consecutive to the sentence in action No. 15127.

"NOW THEREFORE, GOOD CAUSE APPEARING THEREFOR, it is ordered that the order to show cause heretofore issued be, and it is hereby discharged, and that the petition for a writ of habeas corpus be, and it is hereby DENIED.

"Dated: June ....., 1955.

"/s/ Edward P. Murphy
"United States District Judge"

QUESTION PRESENTED.

Does the use of the preposition "with" instead of the preposition "to" following the word "consecutive" operate so as to create a concurrent rather than a consecutive sentence?

ARGUMENT.

Appellant argues that his commitment for escape should be interpreted as imposing a concurrent

sentence "to" the sentence imposed for the interstate transportation of a stolen motor vehicle. A similar contention was made in the case of *Lipscomb v. Madigan,* No. 14,730, in the Court of Appeals for the Ninth Circuit, decided June 27, 1955. There, as here, the preposition "with" was used instead of the preposition "to". The Court held, however, that the judgment was sufficient to impose a consecutive sentence. In *United States v. Daugherty,* 269 U.S. 360, the Supreme Court said that while "sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehension by those who must execute them. The elimination of every possible doubt cannot be demanded."

In *Butterfield v. Wilkinson,* 215 F.2d 320 (9th Cir. 1954), this Court stated "as respects the use of the phrase 'consecutively with' rather than 'consecutively to,' it seems to us that for all practical purposes one manner of putting it is as clear as the other."

In the instant case appellant's only point is the use of a preposition. What is involved here is not the propriety of the sentencing court's grammar but what the court fairly intended in its judgment. In criminal sentences the word "concurrently" means that a prisoner should serve his sentences at the same time. The word "consecutively", on the other hand, means that the sentence should begin to run at the expiration of the other sentences referred to in the judgment. In *Martini v. Johnston* (9th Cir.), 103 F.2d 597, cert. denied, the judgment read, after

imposing concurrent sentences on Counts One through Eight, "on Count 9 the sentence to run *consecutively with* the sentence on Counts One to Eight." (Emphasis added.) This Court of Appeals held that the proper interpretation of the sentence on Count Nine was "to run consecutively with the sentence on Counts One to Eight". The Supreme Court declined to review the Ninth Circuit interpretation. In the *Martini* case this Court expressly held adversely to the contention made here. The ruling in the *Martini* case should not be overruled.

There can be no more basic distinction in criminal sentencing than that between the word "consecutive" and the word "concurrent". When a court uses the word "consecutive" the sentence should be interpreted to run consecutively. A contrary interpretation would be to construe the sentence contrary to the clear intendment of the sentencing court. The judgment should be affirmed.

Dated, San Francisco, California,
October 7, 1955.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.

No. 14866

United States
Court of Appeals
for the Ninth Circuit

A. M. ANDREWS COMPANY OF OREGON and
A. M. ANDREWS OF ILLINOIS, INC.,
Petitioners and Respondents,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent and Petitioner.

Transcript of Record

Petition for Review and Petition for Enforcement of Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —1-25-56

No. 14866

United States
Court of Appeals
for the Ninth Circuit

A. M. ANDREWS COMPANY OF OREGON and
A. M. ANDREWS OF ILLINOIS, INC.,
Petitioners and Respondents,

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NATIONAL LABOR RELATIONS BOARD,
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Petition for Review and Petition for Enforcement of Order of the National Labor Relations Board

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

United States of America

Before the National Labor Relations Board
Division of Trial Examiners

Washington, D. C.

Case No. 14-CA-1208

A. M. ANDREWS COMPANY OF OREGON and A. M. ANDREWS OF ILLINOIS, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Mr. William F. Trent, for the General Counsel.

Messrs. A. M. Andrews and John A. Tuttle of Portland, Ore., for Respondents.

Messrs. Fred Carstens, of St. Louis, Mo., and Hubert Rushing, of Carterville, Ill., for the Union.

Before: George A. Downing, Trial Examiner.

Statement of the Case

This proceeding, brought under Section 10 (b) of the National Labor Relations Act as amended (61 Stat. 136), was heard in St. Louis, Missouri, on September 20, 1954, pursuant to due notice. The complaint and amended complaint, issued on June 28 and August 27, 1954, respectively, by the General Counsel of the National Labor Relations

Board[1] and based on charges duly filed and served, alleged in substance that Respondents had engaged in unfair labor practices proscribed by Section 8 (a) (1) and (3) of the Act (a) by locking out their maintenance and production employees on or about June 1, in order to discourage membership in the Union, because they had joined or supported the Union, (b) by polling and questioning their employees concerning their union activities, sympathies, etc., and (c) by encouraging their employees to form an independent union in order to avoid bargaining with IAM.

Respondents answered, denying generally all allegations of the complaint.

All parties were represented by counsel or by other representatives, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, to argue orally and to file briefs and proposed findings of fact and conclusions of law. Oral argument was heard at the conclusion of the hearing, and the General Counsel has filed a brief.

Upon the entire record in the case and from his

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[1] The General Counsel and his representative at the hearing are referred to herein as the General Counsel and the National Labor Relations Board as the Board. The Respondent Companies are referred to, respectively, as Respondent Oregon and Respondent Illinois, and the charging union as the Union and as IAM. The summary of the pleadings made below is of the amended complaint. All events herein occurred in 1954.

observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The business of the Respondents; their interrelationship

A. M. Andrews Company of Oregon is an Oregon corporation, with its principal office, place of business, and plant at Portland, Oregon. Its capital stock is owned by A. M. Andrews (345 shares), Alex Marshall (16 shares), Norman Brown (1 share), and Ray H. Lesher (1 share). A. M. Andrews of Illinois, Inc., is an Illinois corporation, with its principal office, place of business, and plant located at Carterville, Illinois. Its capital stock is owned by A. M. Andrews, John A. Tuttle, Norman Brown, and Ray H. Lesher, each of whom owns one share. Andrews is president, Brown Treasurer, and Lesher secretary of both corporations.[2] Marshall is vice president of the Oregon corporation, and Tuttle of the Illinois corporation.

Both corporations are engaged in the manufacture of plastic hose sprinklers. The Oregon corporation began operations in 1951. The Illinois corporation was organized February 23, 1954, and began actual manufacturing operations in Carterville on April 27, after negotiations between Andrews and a group of local businessmen. Andrews sent two men from Portland to supervise the setting up of the Carterville plant and the training of personnel;

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[2] Lesher resigned as secretary of the Oregon corporation on July 26, and was succeeded by Brown.

and one of them, Jimmy Patterson, became production foreman. In addition, Tuttle, who is Andrews' nephew, was sent to Carterville as the managing agent of the plant.

Separate bookkeepers were employed and separate books were kept for the two companies. However, the Oregon corporation furnished the credit for the Illinois corporation by guaranteeing payment of the latter's purchases; and, following the final shutdown of the Carterville plant on August 3, the inventory, machinery, and equipment were shipped to Portland and taken over by the Oregon corporation to secure its guarantee of the unpaid balance due thereon.

The annual sales of the Oregon corporation (for 12 months ending June 30, 1954) were approximately $943,000, of which approximately $791,000 were to extrastate points. Its annual purchases from extrastate points during the same period were approximately $359,000. For seven months ending July, 1954, the total sales of the Oregon corporation amounted to approximately $573,000, of which more than $210,000 were made directly to extrastate points; its extrastate purchases during the same period exceeded $120,000.

From April 27, 1954, through the month of July, the Illinois corporation sold products amounting to approximately $26,000, of which approximately $22,000 were sold and shipped directly to points outside the State of Illinois. During the same period the Illinois corporation purchased goods from extrastate points amounting to approximately $21,370.

The foregoing facts establish that the relationship between the two corporations was sufficiently close that they may be considered as parts of a multi-state enterprise for jurisdictional purposes. Cf. N.L.R.B. vs. Daboll, etc., 34 LRRM 2791, (CA 9), decided September 17, 1954. And when so considered, it is obvious that Respondents' operations meet the jurisdictional criteria recently announced by the Board for the assertion of jurisdiction. See Vol. 34, LRR Analysis, Nos. 19 and 23.

It is, therefore, found that Respondents are engaged in interstate commerce within the meaning of the Act, and that it will effectuate the purposes of the Act for the Board to assert jurisdiction herein.

II. The labor organization involved

The Union is a labor organization which admits to membership employees of Respondent Illinois.

III. The unfair labor practices

A. The evidence:

The Carterville site was selected by Andrews after negotiations with Godfrey Hughes, of Southern Illinois, Inc. (an organization interested in the industrial development of southern Illinois) and a committee of Carterville businessmen, consisting of Lee Hooker, Mack Steffes, Paul Dorcy, and Wes Hayton. Andrews testified that that industrial group arranged for the financing and construction of the plant building, and that the Illinois corporation entered into a purchase agreement.

The plant began actual operations on April 27, with 5 or 6 employees, and by June 1, it had approximately 38 employees. On May 11 the plant was shut down temporarily, and the employees were laid off by a notice which informed them that the shutdown was due to lack of orders and that they would be notified of recall. Operations were resumed on May 26, and Tuttle then informed the employees that the Company had plenty of material and orders and that, so far as he could determine, there would be plenty of work for the rest of the summer.

During the period of the layoff, the Union (unknown to Respondents) conducted an organizational campaign among the employees and under date of May 27, the Union wrote the Illinois Company informing it that a majority of its employees had authorized the Union to represent them and requesting recognition and a meeting for negotiations.[3]

The Union's letter was received on June 1, at Carterville, by Tuttle, who immediately called Andrews in Portland. Andrews directed Tuttle to close down the plant, and Tuttle posted a notice stating that, effective as of 4:30 p.m. (the regular quitting time), the plant would be closed. The notice speci-

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[3] Following a consent election agreement and the withdrawal by the Union of a refusal to bargain charge, an election was held on June 17, resulting in a vote adverse to the Union. On June 22, the Union filed objections to the conduct of the election which are still pending before the Regional Director.

fied no reason for the closing, and witnesses for the General Counsel testified that there was no shortage of materials at the time.

Shortly after 2 p.m., a committee of businessmen (Hughes, Hooker, Steffes, Hayton, and Phil Heckle) appeared at the plant, called a meeting of the employees during work time, and addressed them on the subject of the Union and its request to bargain. The witnesses were agreed that Hughes read from the Union's letter to the Company, and three of them testified that Hughes went into the office to obtain it. Though neither Tuttle nor Patterson was present during the meeting, Evelyn Baltimore testified that she saw Tuttle in the office; and Patterson's presence in the plant was established both before and after the meeting.

Hughes, who acted as chief spokesman for the group, stated that he had had a phone call from Tuttle, and after reading from the Union's letter requesting bargaining, he said that the notice on the bulletin board that the plant was closing was Andrews' answer to the letter, and that Andrews would not tolerate a union in the plant. Hughes continued that if the notice was still on the bulletin board at quitting time, it would mean that there would be no more work, and that the plant would be closed down and would move back to Oregon. Hughes also said that though he could probably get another plant into the building, it would take approximately six months to do so, and he could not guarantee that any of the Andrews employees would have jobs there. Hughes inquired whether

the employees would reconsider and would continue to work as before, without a union, and stated that if they would, he would call Andrews and see if he could get the notice taken off the board before 4:30. Hughes suggested that the employees take a vote on the question, but stated that he was not authorized to call one.[4]

Thereupon two of the employees went into the office and procured slips of paper which were distributed among the employees in the presence of the committee. Since it was understood the ballots were to be signed, many of the employees apparently did not cast votes, and the slips were destroyed. Thereupon a second vote was called for (either by Hughes or Steffes) by a show of hands; and when a majority voted to continue working without a union, Hughes went in to the office again to place a phone call to Andrews. The meeting had lasted from about 2:10 p.m. until after 3:00 p.m.

Hughes did not report back to the employees. The notice was still on the board at 4:30 p.m., and Patterson paid off the employees in full, including pay for the time spent in the meeting with the committee.[5] The plant has not since operated except

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[4] At some point during the meeting the employees raised a question about their wage rates and about raises. Hooker went in to the office to "see Mr. Tuttle and get the straight of it," and came back with the information the employees sought, stating that it "was straight from the office."

[5] At the time of the previous shutdown on May 11, which also fell on a Tuesday, the employees had been paid only through the workweek which ended the previous Friday.

for two or three days in June or July, when four or five employees were called in to complete a shortage on a government order. On August 3, the Carterville operations were terminated permanently, the inventory and machinery being shipped to Portland.

Aside from the foregoing, the only evidence of unfair labor practices was undenied testimony by Robert Ogden that sometime before the May 11 shutdown, and prior to the IAM's campaign, his foreman, Patterson, had a discussion with him concerning unions, during which Patterson said he thought it would be better to have a company union among the employees, and that he did not think Mr. Andrews would stand for a large union to come into the plant. However, that isolated instance of the expression of personal views by a minor supervisor cannot be found to constitute an unfair labor practice. The conversation appeared to be a casual one, devoid of either coercive intent or effect. Thus Ogden's testimony contained no indication that he regarded Patterson's remarks as other than an expression of his own opinion, or that Ogden assumed that Patterson was speaking for, or that his views reflected the views of, management. There is accordingly no support in the record for the allegation of the complaint that Respondents encouraged their employees to form an independent union.

Respondents offered no refutation of any of the foregoing evidence. Tuttle admitted that he called Andrews immediately after receipt of the Union's letter of June 1, and that Andrews thereupon di-

rected the shutdown. Andrews admitted that Hughes called him on June 1 and tried to persuade him to keep the plant running a few days as Hughes felt he could straighten out the "union trouble" with the employees. Hughes requested authority to direct Tuttle not to shut down. Andrews refused, telling Hughes he would not permit a labor union to dictate his plans, and that he was closing the plant down.

Andrews testified that the shutdown was due, as in the case of that of May 11, to a mounting inventory of completed products and to a lack of orders, that it was intended "for the time being" as a temporary shutdown, and he implied that the decision had been reached prior to the receipt of the Union's letter. He and Tuttle testified that at the time of the earlier shutdown there were on hand some 850 dozen sprinklers, which number had been reduced to about 400 dozen on May 26, when operations were resumed; that daily production was around 2,500 to 3,000 (i.e., between 200 to 250 dozen) on May 26, 27, and 28, and that on May 28, the inventory had increased to some 1,250 dozen. Andrews testified, however, that with a holiday coming up Monday, he decided to give the employees the paid holiday and one day's work on Tuesday, and then close the plant until the inventory was reduced again. Andrews' testimony included no explanation as to the time when the decision was reached, or how, in view of the intervening week-end and Memorial holiday, he could have become apprised of the May 28 inventory prior to

Tuttle's call on June 1. Indeed, Andrews admitted that the order to close the plant was not given until after he got the call from Tuttle.

B. Concluding findings:

There is no denial, on the record, of the acts and statements which the General Counsel's witnesses testified to, as summarized above. However, the record and the contentions of the parties present three main questions for determination, as follows: (1) Whether Respondents are responsible for the acts and statements of the businessmen's committee on June 1; (2) whether the shutdown was a lockout which was made to discourage Union membership; and (3) whether Respondent Oregon was a co-employer of the Carterville employees or was otherwise responsible for remedying the unfair labor practices which are found herein. Those questions will be considered in order, the question of Oregon's responsibility being reserved for final consideration since it relates more directly to the framing of an appropriate remedy.

1. Responsibility for the acts and statements of the businessmen's committee.

It is sometimes difficult to determine the extent to which principles of the law of agency are to be applied in fixing employer responsibility for the acts and statements of outsiders who intrude into organizational campaigns of employees. For instance, in L & H Shirt Company, 84 NLRB 248, the Trial Examiner had based his findings of company responsibility for plant speeches by local busi-

nessmen on recognized principles of the law of agency, e.g., that the affirmance or adoption of unauthorized acts may be inferred from the failure to repudiate them, where the circumstances are such as to require the principal, knowing of the acts, to disavow them unless he approved. Id., p. 274, and cases cited. The Board, though affirming the Trial Examiner's finding of company liability, did so "without passing * * * on whether such liability may be based on technical agency principles," holding that "in view of the circumstances in which the statements were made, the Respondent was under a duty to repudiate and deny their validity" and by its failure to do so, it "became responsible for the utterances." Id., p. 252.

More recently, however, the Board has acknowledged the applicability of agency principles in determining the question of company responsibility for the acts of a citizens' committee. Thus, in Livinston Shirt Corp., 107 NLRB No. 109, the Board held that the evidence failed to establish "the existence of the requisite prima facie agency relationship", observing that:

The record is barren of any evidence that Respondent Livingston aided, abetted, assisted, or cooperated with the Respondent Citizen's Committee. Nor did Respondent Livingston allow the Respondent Citizen's Committee the use of company time or property for the distribution of antiunion argument, by either written or spoken words. We therefore find no merit in the agency contentions of the General Counsel.

Among the cases there cited by the Board, Waynline, Inc., 81 NLRB 511, and Armco Drainage and Metal Products, Inc., 106 NLRB No. 121, are more closely in point here. In the Armco case the Board found that the employer was responsible for acts of interference engaged in by individual local citizens who made statements to employees implying that the employer would remove his plant from the locality if the union won the election, since the employer aided, abetted, assisted, and cooperated with those citizens in their campaign against the union. In the Waynline case, the Board held that:

In view of the actions of the Respondent's supervisors in allowing the Committee to interrogate Faulk and Pye concerning union activities, to urge them to abandon the Union, and to promise them a wage increase, and in view of the Respondent's subsequent payment of these employees for the time they spent with the Committee, a clear responsibility devolved upon the Respondent to disavow the actions of the Committee. [Citing Fred P. Weissman Company, 69 NLRB 1002, 1019, enf'd 170 F.2d 952 (CA 6.)] By its silence under these circumstances, the Respondent clearly, as the Trial Examiner found, acquiesced in and approved the interrogation of and promise of benefit to, its employees.

The evidence in the present case plainly supplied what the Board found lacking in the Livingston case, supra. Thus, the Hughes committee was subsequently identical with the one with which Andrews had negotiated for the establishment of the

Carterville plant and which had sponsored or financed the construction of the building which was occupied by the plant. The committee appeared on the scene immediately following Tuttle's receipt of the Union's bargaining request and following a call from Tuttle to Hughes. It called a lengthy meeting of employees which was devoted to attempting to settle the "Union trouble" and to procuring, through threats and promises, the employees' renunciation of the Union. During that meeting Hughes and Hooker procured from the office (in which Tuttle was seen) the Union's letter to Tuttle and information to answer employee questions concerning their wage rates.

The foregoing circumstances, particularly the timing, the place, and the subject matter of the meeting, established not only knowledge and acquiescence, but actual assistance and cooperation by the Company in permitting the use by the committee of Company time and property for coercive acts and utterances which it made no attempt to disavow. Indeed, the Company paid the employees for the time spent with the committee.

It is, therefore, concluded and found that Respondent Illinois[6] was responsible for the acts and statements of the committee and that it thereby engaged in interference, restraint, and coercion within the meaning of Section 8 (a) (1) of the Act, as

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[6] It is found under Section 3, Infra, that Respondent Oregon was not responsible for any of the unfair labor practices which were committed at Carterville.

follows: Hughes' statements that the shutdown notice was Andrews' answer to the Union's bargaining request and that Andrews would not tolerate a union in the plant; his threat that the plant would be moved back to Oregon and the building leased to another tenant; and by conducting, in the foregoing context, the two polls by which the employees' renunciation of the Union was sought (Cf Richards and Associates, 110 NLRB No. 23).

2. Was the shutdown a lockout made to discourage Union membership?

The General Counsel's evidence, considered alone, plainly established the allegation of the complaint that the shutdown of June 1 was a lockout which was made to discourage Union membership and activities. Thus, the plant had operated for only three working days following the resumption of operations on May 26, and Tuttle's statements then made that there were sufficient orders and materials on hand for the summer. The shutdown was ordered precipitately, immediately on receipt of the Union's request for recognition and bargaining; and it was followed immediately by the visit of the committee of businessmen who informed the employees in express terms that the shutdown notice was Andrews' answer to the Union's letter, that Andrews would not tolerate a union, and that he would move the plant away. The foregoing facts, none of which were denied by Respondents, plainly showed that the advent of the Union was responsible for the timing of the shutdown (Cf. Tennessee-Carolina Transportation, Inc., 108 NLRB No. 179), and es-

tablished a case of discrimination under the Act unless overcome by countervailing evidence on Respondent's behalf.

But the evidence which Respondents offered was wholly inadequate to overcome the General Counsel's case. Even though Respondents' evidence were accepted literally as establishing a mounting inventory and a lack of orders, it does not establish that the shutdown was made because of those facts. Indeed, Andrews' testimony was wholly unconvincing that any decision was made prior to receipt of the Union's letter. Thus, he admitted that the order was given after Tuttle's call, and it is questionable that Andrews could have become aware of the May 28 inventory figures prior to that call. But even assuming such awareness, his explanation fails to ring true. For if the Company's business and financial affairs were as precarious as he represented, Andrews would not reasonably have decided to augment its losses and inventory by giving the employees a paid holiday plus another day's work. Furthermore, were the shutdown a temporary one and made on the basis of his claims, no reason is suggested why the employees were not properly notified, as on May 11, or why they were paid off in full at the close of the day.

But the final and conclusive refutation of Andrews' claims was furnished by Tuttle's undenied statements to the employees on May 26, that the Company in fact had both orders and materials sufficient to last the summer. It is inconceivable, in the face of those facts, that the Company would have

reopened its plant, recalled all its employees, and resumed operations for only three days of work.

Thus, in character and weight, Respondents' evidence was wholly inadequate to overcome the case made out by the General Counsel; it served only to confirm the conclusion that the shutdown was made to defeat the organization of the employees.

It is, therefore concluded and found that by locking out its employees on June 1, Respondent Illinois (see footnote 6, supra) engaged in discrimination proscribed by Section 8 (a) (3) and (1).

3. Oregon's responsibility for the unfair labor practices.

It is difficult to ascertain the exact nature of the General Counsel's theory insofar as it concerns the status of the Oregon corporation as a party to this proceeding. Though the examiner had assumed, from the facts stated in the margin,[7] that that cor-

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[7] The original and the first amended charge named only the Illinois corporation as the employer, and the original complaint, issued on June 28, named only that corporation as party Respondent. On July 1, and again on July 15, the Board announced widespread changes in the standards which it would thenceforth observe in determining whether it would take jurisdiction of a case. It is questionable whether the operations of the Illinois corporation considered alone, would meet the new standards. However, on August 27, a second amended charge was filed which joined the Oregon corporation as a co-employer, and simultaneously the General Counsel issued an amended complaint which joined that corporation as a party Respondent and which included among its jurisdictional averments a recital of the business operations of that company.

poration was joined to assure the qualification of the case under the Board's new jurisdictional standards, the General Counsel's brief proceeds from the premise that the Oregon Corporation is the Company and the Respondent herein, and that the Illinois corporation is only the name under which the Oregon corporation operates the Carterville plant as a "branch establishment." Further illustrative of the General Counsel's confusion of the identity of his parties Respondent is the reference in his brief to Andrews, individually, as the Respondent "who directs, manages and controls both the Portland, Oregon, and Carterville, Illinois, establishments."

The point assumes importance here because the shutdown at Carterville has now become permanent, and because it is necessary to determine whether Respondent Oregon may be held responsible for remedying the unfair labor practices.

Though the affiliation between the corporations is sufficiently close that the Board may properly consider the operations of both in deciding whether to assert jurisdiction (see Section I, supra), it is not close enough to establish that either corporation is the alter ego of the other (cf. Diaper Jean Manufacturing Co., 109 NLRB No. 152, 34 LRRM 1504, 1507-8; Mt. Hope Finishing Co. vs. N.L.R.B., 211 F.2d 365, 372 (CA 4)); nor does it show that the Oregon corporation was a co-employer of the Carterville employees, that it actively participated in the commission of the unfair labor practices, or that it is to be held responsible for remedying them.

Thus the evidence shows that the two companies were separate corporate entities, which separately owned and operated plants in widely separate localities, which employed separate sets of production employees, and which kept separate books and records. Though Andrews, individually, owned the controlling stock interest in the Oregon company, he did not do so in Illinois. In the latter corporation, for example, Tuttle, Brown, and Lesher were obviously in position to outvote Andrews in all stockholders' meetings, since together they owned 75 per cent of the corporate stock. Cf. Mt. Hope case, supra, at p. 372. Significant also as indicative of separate entities was the fact that though Lesher resigned as secretary of Oregon on July 26, he did not resign his corresponding position in Illinois. Of further significance, particularly in assessing Oregon's responsibility for commission of the unfair labor practices, is the fact that Tuttle, under whose immediate management the Carterville plant was operated, was neither a stockholder nor an officer of the Oregon company.

The evidence also fails to show that common employment conditions existed in the separate plants which the respective Respondents operated, that their operations were integrated, that they had offices at the same address, or that they maintained a common bank account. Cf. Inter-Ocean Steamship Co., 107 NLRB No. 92. This is not a case of a single, or integrated, enterprise, parcelled into production and distribution, or into other convenient segments, by the corporate arrangements of the Re-

spondents themselves. Cf. N.L.R.B. vs. Concrete Haulers, Inc., 212 F.2d 477, 479 (CA 5), decided May 6, 1954. The case is also distinguishable from Somerset Classics, Inc., 90 NLRB 1676, enf'd. 193 F.2d 613 (CA 2), where the Board found Modern Manufacturing Co. to be a co-employer of Somerset's employees and held it responsible for the unfair labor practices committed at Somerset's plant. The Board and the Court emphasized the ownership, control, and operation of the two companies by the same family and the fact that Somerset depended entirely on Modern for its work.

Though the corporate veil may be lifted and the fiction of separate entities may be disregarded on a sufficient showing, the evidence here is not adequate for that purpose. And, as previously observed, there is no evidence that the Oregon corporation actively concerted or participated with Illinois in the commission of the unfair labor practices. N.L.R.B. vs. Lunder Shoe Corp., 211 F.2d 284, 289, (CA 1). Section 10 (c) of the Act empowers the Board to require unfair labor practices to be remedied by those persons who have engaged in such practices. No provision of the Act authorizes the Board to impose the responsibility for remedying unfair labor practices on persons who did not engage therein. Symns Grocery Co. (Supplemental Decision Amended), 109 NLRB No. 58; N.L.R.B. vs. Birdsall-Stockdale Motor Co., 208 F.2d 234 (CA 10).

It is, therefore, concluded and found that Respondent Oregon did not engage in, or participate

with Respondent Illinois in engaging in, the unfair labor practices found above, and that it may not be held responsible for remedying those unfair labor practices.

The Remedy

Having found that Respondent Illinois has engaged in and is engaging in certain unfair labor practices, the Trial Examiner will recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

It has been found that Respondent Illinois discriminated against its employees by the June 1 lockout. Though the evidence establishes that that shutdown was intended at the time to be only temporary, Andrews' testimony was to the effect that subsequent evaluation of the Company's business and fiscal affairs led to a decision to make the shutdown permanent.[8] It was in the light of those economic considerations (cf. Tennessee - Carolina Transportation Company, 108 NLRB No. 179) that the plant was closed permanently on August 3.

Yet it is clear from the evidence that but for the discriminatorily motivated shutdown, the Carterville plant would have continued operations for some indefinite time after June 1, up to August 3, and that all or many of the employees would have had work during that period. Furthermore, An-

[8] Thus Andrews testified that as of May 31, the Company had "sunk" $71,859.78 in the Carterville operations.

drews testimony showed that the Illinois corporation has not been liquidated, therefore it may conceivably resume operations at some future time in Carterville or at some other location.

It will, therefore, be recommended that Respondent Illinois make whole the employees whose names are listed in Appendix A hereto for any loss of pay they may have suffered as a result of the discrimination against them by payment to each of them of a sum of money equal to that which each would normally have earned as wages during such plant operations as would normally have occurred from June 1 to August 3, inclusive, but for the discriminatory shutdown, less his net earnings during such period, the back pay to be computed in the manner prescribed by the Board in F. W. Woolworth Company, 90 NLRB 289.

It will also be recommended that in the event of resumption of operations at Carterville, or elsewhere, Respondent Illinois offer said employees immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and that, in the event such operations are resumed at a location which is not in the immediate vicinity of Carterville, Respondent Illinois offer to pay the employees involved any necessary and reasonable expense of moving themselves, their families, and their household effects to the vicinity of the plant at which operations are resumed and in which said employees are offered reinstatement. Cf. Symms Grocery Co., supra.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. Respondent Illinois' activities set forth in Section III, above, occurring in connection with Respondents' operations described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing the free flow thereof.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. By discriminatorily shutting down its plant and locking out the employees whose names are listed in Appendix A, thereby discouraging membership in the Union, Respondent Illinois has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) and (1) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, Respondent Illinois has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, it is recommended that Respondent, A. M. Andrews of Illinois, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in the Union, or in any other labor organization of its employees, by shutting down its plant and locking out its employees, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(b) Informing its employees that the plant shutdown was its answer to the Union's letter requesting recognition and that it will not tolerate a union in the plant; threatening to move its plant to Oregon; and conducting polls of its employees to procure their renunciation of the Union; and

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

See Consolidated Industries, Inc., 108 NLRB No. 14, footnote 3.

2. Take the following affirmative action:

(a) Make whole the employees whose names are listed in Appendix A hereof in the manner prescribed in the section entitled "The Remedy," supra;

(b) In the event of resumption of its operations at Carterville, Illinois, or elsewhere, offer to the employees whose names are listed in Appendix A immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges; and in the event such operations are resumed at a location which is not in the immediate vicinity of Carterville, offer to pay the employees involved any necessary and reasonable expense of moving themselves, their families, and their household effects to the vicinity of the plant at which operations are resumed and in which said employees are offered reinstatement.

(c) In the event operations are resumed at Carterville or elsewhere, post in its plant copies of the notice attached hereto and marked Appendix B. Copies of said notice, to be furnished by the Regional Director for the Fourteenth Region, shall, after being signed by Respondent's representative, be posted by Respondent immediately after resumption of operations and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to em-

ployees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material; and

(d) Notify the Regional Director for the Fourteenth Region, in writing, within twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order, what steps Respondent has taken to comply herewith.

It is further recommended that unless on or before twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order, Respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring Respondent to take the action aforesaid.

Dated at Washington, D. C., this 28 day of October 1954.

GEO. A. DOWNING,
Trial Examiner

APPENDIX A

Lucille A. Anderson, Clara Bagwell, Evelyn G. Baltimore, Anna K. Brown, Maggie Lee Calvert, Helen M. Clark, Ruth Ann Elders, Carmen Emery, Maxine D. Emery, Anna J. Eveland, Millie Evett, Jewell Hall, Judith Ann Halstead, Paul Halstead, Myrtle C. Hess, Vera N. Hickam, Pearl A. Hoover, Eleanor Kelly, Lacy L. Lee, Eleanor L. Manning,

June F. Myers, Margaret R. McCluskey, Alice J. North, Bette J. O'Daniel, Robert J. Ogden, Evelyn M. Ollar, Gathel V. Patrick, Laverne Phillips, Madge Popham, Katherine Riggin, Wayne A. Rushing, Peggy Jo Sickling, Elizabeth Ann Smith, Rosalie Stocks, Alberta Mae Tripp, Velma Tygett, Claudia Wynn, Evelyn Yewell, Milo Smith, Elizabeth Beltz.

APPENDIX B

Notice to all Employees Pursuant to the Recommendations of Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in International Association of Machinists, AFL, or in any other labor organization of our employees, by shutting down our plant and locking out our employees, or in any other manner discriminate in regard to their hire or tenure of employment or any term or condition of employment.

We Will Not inform our employees that the plant shutdown was our answer to the Union's letter requesting recognition or that we will not tolerate a union in the plant, or threaten to move our plant to Oregon, nor will we conduct polls of our employees to procure their renunciation of the Union.

We Will Not in any other manner interfere with, restrain or coerce our employees in the exercise of their right to self-organization, to form, join, or

assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

We Will make whole the employees whose names are listed below for any loss of pay they may have suffered from June 1 to August 3, 1954, inclusive, by reason of our discrimination against them;

Lucille A. Anderson, Clara Bagwell, Evelyn G. Baltimore, Anna K. Brown, Maggie Lee Calvert, Helen M. Clark, Ruth Ann Elders, Carmen Emery, Maxine D. Emery, Anna J. Eveland, Millie Evett, Jewell Hall, Judith Ann Halstead, Paul Halstead, Myrtle C. Hess, Vera N. Hickam, Pearl A. Hoover, Eleanor Kelly, Lacy L. Lee, Eleanor L. Manning, June F. Myers, Margaret R. McCluskey, Alice J. North, Bette J. O'Daniel, Robert J. Ogden, Evelyn M. Ollar, Gathel V. Patrick, Laverne Phillips, Madge Popham, Katherine Riggin, Wayne A. Rushing, Peggy Jo Sickling, Elizabeth Ann Smith, Rosalie Stocks, Alberta Mae Tripp, Velma Tygett, Claudia Wynn, Evelyn Yewell, Milo Smith, Elizabeth Beltz.

We Will, in the event we resume operations at Carterville, Illinois, or elsewhere, offer to the employees whose names are listed above immediate

and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges; and in the event we resume operations at a location which is not in the immediate vicinity of Carterville, Illinois, we will offer to pay to said employees any necessary and reasonable expense of moving themselves, their families and their household effects to the vicinity of the plant at which we resume operations.

A. M. Andrews of Illinois, Inc.,
(Employer)

By .....,
(Representative) (Title)

Dated.....

[Title of Board and Cause.]

ORDER TRANSFERRING CASE TO THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled case having been held before a duly designated Trial Examiner and the Intermediate Report and Recommended Order of the said Trial Examiner, a copy of which is annexed hereto, having been filed with the Board in Washington, D. C.,

It Is Hereby Ordered, pursuant to Section 102.45 of the National Labor Relations Board Rules and Regulations that the above-entitled matter be, and

it hereby is, transferred to and continued before the Board.

Dated, Washington, D. C., October 28, 1954.

By direction of the Board:

/s/ FRANK M. KLEILER,
Executive Secretary

Affidavit of Service by Mail and Return P. O. Receipts attached.

[Title of Board and Cause.]

REQUEST FOR EXTENSION OF TIME to File Exceptions to Intermediate Report and Recommended Order of Trial Examiner, and Brief in Support of Said Exceptions.

A. M. Andrews Company of Oregon, a corporation organized and existing under the laws of the State of Oregon, and A. M. Andrews of Illinois, Inc., a corporation organized and existing under the laws of the State of Illinois, by and through their legal counsel, Maguire, Shields, Morrison and Bailey, 723 Pittock Block, Portland, Oregon, hereby make request for extension of time to file exceptions to the Intermediate Report and Recommended Order of the Trial Examiner in the above titled and numbered proceedings, and to file brief in support of said exceptions, on the grounds and for the reasons hereinafter set forth:

1. That the time allowed in the Order transferring the case to the National Labor Relations Board, for the filing of exceptions to the Intermediate Report and Recommended Order of the Trial Examiner, expires on November 22, 1954;

2. That the Intermediate Report and Recommended Order of the Trial Examiner was received in Portland, Oregon, by A. M. Andrews Company of Oregon, and by A. M. Andrews of Illinois, Inc., on October 30, 1954, and was delivered to the offices of Maguire, Shields, Morrison & Bailey, Attorneys, Portland, Oregon, for consideration of said attorneys, on November 4, 1954;

3. That a transcript of the evidence taken at the hearing before the Trial Examiner is not available to the attorneys for said companies, and, in fact, the representatives of the companies who appeared at the hearing are unable to provide said attorneys with the name and address of the reporter who recorded said evidence at the hearing;

4. That the attorneys for the company have made prompt inquiry of Mr. William F. Trent, General Counsel of the National Labor Relations Board, St. Louis, Missouri, for the name and address of the reporter who recorded the evidence at the hearing, and, by necessity, some time will elapse before the transcript of evidence can be prepared and forwarded to the attorneys for the company;

5. That it appears from the Intermediate Report of the Trial Examiner that Mr. A. M. Andrews and Mr. John A. Tuttle, representatives of

the companies, appeared at the hearing before the Trial Examiner without the benefit of legal counsel, and that the evidence adduced at the hearing in behalf of the companies (Respondents) was meager, if not virtually non-existent, and that such evidence as was so adduced was presented by said company representatives without adequate knowledge of the scope or purpose of said hearing;

6. That it further appears from the Intermediate Report of the Trial Examiner that these proceedings should be reopened for the purpose of receiving further evidence, in order for the National Labor Relations Board to be properly apprised of the circumstances which occasioned the closing down of the Carterville, Illinois, plant of A. M. Andrews of Illinois, Inc., and that fact will be properly developed in the exceptions to the Intermediate Report of the Trial Examiner which will be filed after an analysis of the transcript of the evidence adduced at the hearing before the Trial Examiner;

7. That the further evidence which will be adduced in behalf of the companies (Respondents) in the event these proceedings are reopened, for the purpose of receiving further evidence, are as set forth in the supporting affidavit attached hereto, marked Exhibit A, and by this reference made a part hereof;

8. That the time necessarily entailed in obtaining a transcript of the evidence taken at the hearing, and in preparing the necessary exceptions to the Intermediate Report and Recommended Order

of the Trial Examiner, precludes said matters being completed on or before November 22, 1954.

Now, Therefore, it is requested that the National Labor Relations Board extend the time within which the companies (Respondents) may file exceptions to the Intermediate Report and Recommended Order of the Trial Examiner, and brief in support of said exceptions, to and including the 31st day of December, 1954.

Respectfully submitted,

A. M. Andrews Company of Oregon,
an Oregon Corporation, Respondent

/s/ By A. M. ANDREWS,
President

A. M. Andrews of Illinois, Inc., an Illinois Corporation, Respondent

/s/ By A. M. ANDREWS,
Maguire, Shields, Morrison & Bailey,

/s/ RALPH R. BAILEY,
Counsel for Respondents

EXHIBIT A

State of Oregon,
County of Multnomah—ss.

I, A. M. Andrews, of Portland, Oregon, being first duly sworn depose and say that:

I am President of A. M. Andrews Company of Oregon, an Oregon corporation, and A. M. Andrews of Illinois, Inc., an Illinois corporation;

That the business of A. M. Andrews Company of Oregon now is, and has been since organization of the company, the manufacture and sale of plastic lawn sprinklers, and that the business of A. M. Andrews of Illinois, Inc., was, during the period that said company operated a plant at Carterville, Illinois, for about two months during the year 1954, the manufacture and sale of plastic lawn sprinklers;

That A. M. Andrews of Illinois, Inc., has engaged in no business whatsoever since the Carterville, Illinois, plant of the company was closed on or about June 1, 1954, save and except for two or three days of operation in June, 1954, to complete a government order for plastic lawn sprinklers;

That, due to the moderate weather conditions throughout the nation in the summer months of 1954, the market for lawn sprinklers was substantially below normal, and this is demonstrated by the fact that the sales of A. M. Andrews Company of Oregon were $1,209,637.59 in the calendar year 1953, whereas the combined sales of A. M. Andrews Company of Oregon, and of A. M. Andrews of Illinois, Inc., through the month of September, 1954, were $613,911.45 (Sales by A. M. Andrews Company of Oregon in said period were $585,-542.14, and sales by A. M. Andrews of Illinois, Inc., were $28,369.71).

That A. M. Andrews Company of Oregon provided capital to finance the operation of the plant by A. M. Andrews of Illinois, Inc., at Carterville, Illinois, in aggregate amount of $68,216.90, which

said capital so provided consisted of $5000.00 paid in for the capital stock of the Illinois company, and $63,210.90 loaned to the Illinois company for the purpose of purchasing plastic materials and paying operating expenses, and that said amount so loaned was secured by a pledge of the plastic material inventory of the Illinois company;

That during the period that the Carterville, Illinois, plant was operated by the Illinois company, which said period was about two months, there was incurred an operating loss in amount of $27,460.28, and that said loss was so incurred by reason of the fact that orders for plastic lawn sprinklers were not obtained in sufficient volume to permit said plant to break even or operate at a profit;

That substantially all of the net worth of A. M. Andrews Company of Oregon, and by the same token all of the available capital of said company, was used to provide the Illinois company with capital by way of investment in stock and loans, and this is demonstrated by the fact that the net worth of the Oregon company on December 31, 1953 was $76,696.78, and said net worth on September 30, 1954, without taking into account the loss which must be absorbed by reason of investment in the stock of and loans to the Illinois company, was $89,589.93;

That A. M. Andrews Company of Oregon was compelled to obtain bank loans of approximately $150,000.00 to finance its own operations in 1954, and said company was not in a position to advance

further capital to the Illinois company beyond the aggregate sum of capital in amount of $68,210.90 which was provided by investment and loans prior to June 1, 1954;

That the market for lawn sprinklers in the summer of 1954 did not justify the continuation of operation of the Carterville, Illinois, plant by the Illinois company after June 1, 1954, and if said operation had continued after said date there would have resulted increased operating losses which would have not only forced the Illinois company out of business, but would have endangered the continuation of business by the Oregon Company, which said facts were known to the officers and directors of the two companies prior to June 1, 1954 and was the primary reason for discontinuing the operation of the Carterville, Illinois, plant on or about June 1, 1954.

/s/ A. M. ANDREWS

Subscribed and sworn to before me this 13th day of November, 1954.

[Seal] /s/ RAYMOND L. JONES,
Notary Public for Oregon

[Title of Board and Cause.]

EXCEPTIONS OF RESPONDENTS TO THE INTERMEDIATE REPORT AND RECOMMENDED ORDER OF THE TRIAL EXAMINER Filed with The National Labor Relations Board in the above-entitled and numbered Proceedings on October 28, 1954.

A. M. Andrews Company of Oregon, an Oregon Corporation, and A. M. Andrews of Illinois, Inc., an Illinois Corporation, hereinafter referred to as the Respondents, hereby take exception to the Intermediate Report and Recommended Order of the Trial Examiner, filed with The National Labor Relations Board in the above-entitled and numbered cause on October 28, 1954, on the grounds and for the reasons as set forth in following numbered paragraphs.

1. The trial Examiner erred in concluding that the relationship of A. M. Andrews of Oregon, an Oregon Corporation, and A. M. Andrews of Illinois, Inc., an Illinois Corporation, was sufficiently close that said Corporations may be considered as parts of a multi-state enterprise for jurisdictional purposes, in that it appears from the record that said Corporations were not engaged in the operation of a single unitary business, and that neither of said Corporations was a subsidiary of the other, and that said Corporations were not affiliated in the sense that the stock of each was owned by the same stockholders in the same proportions. (References

to the Intermediate Report and Recommended Order of the Trial Examiner will herein be identified by symbol IR, and the Official Report of Proceedings before the Trial Examiner will be identified by symbol TR.) (IR, p. 2, lines 5 to 60, inclusive; TR, p. 26-27).

2. The Trial Examiner erred in concluding that the operations of A. M. Andrews of Illinois, Inc., an Illinois Corporation, meet the jurisdictional criteria recently announced by The National Labor Relations Board for the assertion of jurisdiction, in that the record shows that there was less than $50,000.00 worth of goods produced or handled which constituted either a direct or indirect outflow into interstate commerce, and the record shows that there was less than $500,000.00 worth of goods received which constituted a direct or indirect inflow from interstate commerce. (IR, p. 2, lines 55 to 60, inclusive; TR, p. 26-27).

3. The Trial Examiner erred in concluding and finding that the Respondent, A. M. Andrews of Illinois, Inc., was responsible for the acts and statements of the Business Men's Committee which appeared at the company's plant on June 1, in that the testimony of the witnesses adduced by the Union with respect to such acts and statements was rank hearsay, and in that the record is devoid of evidence competent to bind the Respondent with respect to any asserted admissions based on such hearsay testimony. (IR, p. 5, lines 49 to 62, inclusive, p. 6, lines 1 to 62, inclusive, p. 7, lines 1 to 14, inclusive; TR, p. 32-89).

4. The Trial Examiner erred in finding and concluding that the shutdown of the plant operated by A. M. Andrews of Illinois, Inc., at Carterville, Illinois, was a lockout to discourage Union membership, in that said finding and conclusion is based on testimony which constituted hearsay of the most objectionable character and on testimony which in any event was not binding on the Respondent, and in that said finding and conclusion is flatly contradicted by the only properly admissible evidence presented at the hearing (the direct testimony of A. M. Andrews). (IR, p. 7, lines 19 to 62, inclusive, p. 8, lines 1 to 12, inclusive; TR, p. 32-89, 101-147.)

5. The Trial Examiner erred in finding and concluding that the Respondent, A. M. Andrews of Illinois, Inc., shut down its plant at Carterville, Illinois, permanently on August 3, 1954, and that there was a lockout of the employees of Respondent on and after June 1, 1954 and to and including August 3, 1954, in that the record is utterly devoid of evidence that the Respondent shut down its plant on any date other than June 1, 1954, and there is a failure of proof that the cause of the shutdown was a purpose of the Respondent to lockout its employees as a means of thwarting union organization. (IR, p. 9, lines 56 to 62, inclusive, p. 10, lines 1 to 41, inclusive; TR, 101-147).

6. The Trial Examiner erred in recommending that the Respondent, A. M. Andrews of Illinois, Inc., make whole certain former employees (as designated in Appendix A attached to the Intermediate Report and Recommended Order) for pay equal

to that which each would normally have earned as wages during such plant operations as would normally have occurred from June 1 to August 3, inclusive, in that the record shows conclusively that there exists no measuring rod to determine what any such former employee normally, or abnormally, would have earned if the plant had operated, and in that the record is utterly devoid of evidence to indicate that the plant operations normally, or abnormally, would or could have been other than what actually occurred, namely, no operations whatsoever except for two or three days in June or July. (IR, p. 10, lines 17 to 26, inclusive).

7. The Trial Examiner erred in attributing undue probative value to testimony to the effect that John Tuttle, an officer and employee of Respondent, A. M. Andrews of Illinois, Inc., stated to the employees on May 26th that the company had plenty of material and orders, and that, so far as he could determine, there would be plenty of work for the rest of the summer, in that in so doing the Trial Examiner ignored the further testimony of a witness for the Union that John Tuttle further stated that "we would run the summer out if things were according to our expectations". (IR, p. 3, lines 23 to 31, inclusive; TR, p. 48).

8. The Trial Examiner erred in concluding as a matter of law that the operations and activities of Respondent, A. M. Andrews of Illinois, Inc., had a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tended to lead to labor disputes burdening and ob-

structing the free flow thereof. (IR, p. 10, lines 45 to 50, inclusive).

9. The Trial Examiner erred in concluding as a matter of law that the Respondent, A. M. Andrews of Illinois, Inc., engaged in unfair labor practices within the meaning of Section 8 (a) (3) and (1) of the National Labor Relations Act by discriminatorily shutting down its plant and locking out its employees. (IR, p. 10, lines 54 to 58, inclusive).

10. The Trial Examiner erred in concluding as a matter of law that the Respondent, A. M. Andrews of Illinois, Inc., was engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the National Labor Relations Act by interfering with, restraining, and coercing its employees in exercise of rights guaranteed in Section 7 of said act. (IR, p. 11, lines 1 to 5, inclusive).

11. The Trial Examiner erred in concluding as a matter of law that the Respondent, A. M. Andrews of Illinois, Inc., engaged in unfair labor practices within the meaning of Section 2 (6) and (7) of the National Labor Relations Act.

12. The Trial Examiner erred in concluding that the Carterville, Illinois, plant of Respondent, A. M. Andrews of Illinois, Inc., was not shut down because of mounting inventory and lack of orders, in that said Trial Examiner thereby rejected the uncontroverted testimony of A. M. Andrews as to the precarious financial condition of the Respondent on June 1, and, in fact, at the hearing refused to accept as material financial statements offered by A. M. Andrews which would have established beyond

question that the financial condition of Respondent was such as to make a shut down of the plant on June 1 a necessity. (IR, p. 7, lines 36 to 53, inclusive; TR, 128-147). The Respondents further request that the Board reopen the record and receive further evidence in this proceeding, and that, for the purpose of taking such further evidence, the Board designate and authorize one of its representatives to take depositions in Portland, Oregon, with the object of recording the true and complete facts concerning the financial condition of Respondent, A. M. Andrews of Illinois, Inc., and Respondent, A. M. Andrews Company of Oregon, on June 1, 1954, and the true and complete facts concerning the reason for the shut down on June 1 of the Carterville, Illinois, plant of A. M. Andrews of Illinois, Inc. The taking of depositions as herein requested will disclose that, due to the moderate weather conditions which prevailed throughout the country in the summer months of 1954, the market for lawn sprinkling equipment was far below normal, and that the single product manufactured by Respondents could not be sold in sufficient quantity to justify the operation of the Carterville plant of Respondent, A. M. Andrews of Illinois, Inc. The depositions will show that, whereas the sales of lawn sprinklers by Respondent, A. M. Andrews Company of Oregon, in the calendar year 1953 were $1,209,637.59, the combined sales of both Respondent A. M. Andrews Company of Oregon and Respondent A. M. Andrews of Illinois, Inc., in the months of January to September, inclusive, 1954,

were $613,911.45. (Sales of A. M. Andrews Company of Oregon in said period were $585,542.14, and sales of A. M. Andrews of Illinois, Inc., in said period were $28,369.71).

The depositions would further show that the paid in capital of the Illinois Company was $5000.00, and that the operations of said Company prior to the shut down were possible only by reason of the fact that the Oregon Company guaranteed the payment of, and has either paid or is liable for the payment of, the purchase price for all plastic materials purchased by the Illinois Company for use in the manufacture of lawn sprinklers. The depositions will show that the liability incurred for plastic materials so purchased was $63,210.90. Further pertinent facts which should be in the record are that the Illinois Company incurred a loss of $27,460.28 during the period that its plant was operated, and that on June 1 it was apparent to the management of both the Oregon Company and the Illinois Company that further operation of the Carterville plant would result in further losses. The depositions would further show that the Oregon Company was not in a financial condition to provide further capital of the Illinois Company by way of guaranteeing payment of, or paying, the purchase price for plastic materials to be used in manufacture by the Illinois Company of lawn sprinklers for which there existed no market. Thus, the record would show that the net worth of the Oregon Company on December 31, 1953 was $76,696.78, and that the net worth of said Company on September 30, 1954, without

taking into account the loss to be absorbed by reason of liability for the debts of the Illinois Company in amount of approximately $60,000.00, was $89,589.93.

The depositions would show that, on June 1, 1954 when the Carterville plant was shut down, Respondent A. M. Andrews of Illinois, Inc., did not have a single unfilled order on hand to justify the continued operation of the plant, save and except for a small government order which was filled by two or three days of operation in June or July and by the employment of four or five production workers, and that market conditions were such that future volume of orders could not be anticipated which would permit the Carterville plant to avoid operating at a loss. The depositions would further show that the financial condition of the Oregon Company has deteriorated over the period since June 1, 1954, and, in fact, that the condition of said Company at the present time is such that, at the insistence of the manufacturer who has been supplying the plastic materials, the management of said Company has been placed in the hands of trustees.

If depositions are taken as herein requested, and the full facts recorded in these proceedings, it will abundantly appear that the Carterville plant of Respondent A. M. Andrews of Illinois, Inc., was closed on June 1, 1954 by reason of, and only by reason of, economic necessity, and that said plant has been permanently abandoned for the same reason.

It is apparent from a reading of the Official Report of Proceedings before the Trial Examiner that

the full and true facts, as to the reason for the shut down of the Carterville plant, were not presented at the hearing before the Trial Examiner because A. M. Andrews and John Tuttle, representatives of the Respondents, appeared at the hearing without benefit of legal counsel neither prior to or at the hearing and without an adequate understanding of the scope or purpose of the hearing. In fact, the efforts of Andrews and Tuttle to represent the Respondents was a travesty, and the only way in which this matter can be properly presented to the Board is by reopening the record for the purpose of taking further evidence. The request is made that such further evidence be taken by deposition in Portland, Oregon, before a duly authorized representative of the Board, in order to avoid the expense of attendance at another hearing in St. Louis, Missouri, or elsewhere. Neither of the Respondents is now financially able to bear the expense of legal counsel or witnesses at a hearing at St. Louis, Missouri, or elsewhere.

Respectfully submitted,

Respondent A. M. Andrews Company of Oregon, an Oregon Corporation

Respondent A. M. Andrews of Illinois, Inc., an Illinois Corporation

/s/ RALPH R. BAILEY,

Attorney for Respondents

Affidavit of Service by Mail attached.

United States of America

Before The National Labor Relations Board

Case No. 14-CA-1208

A. M. ANDREWS COMPANY OF OREGON and A. M. ANDREWS OF ILLINOIS, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL.

DECISION AND ORDER

On October 28, 1954, Trial Examiner George A. Downing issued his Intermediate Report in the above-entitled proceeding, finding that one of the Respondents, A. M. Andrews of Illinois, Inc., hereinafter referred to as Respondent Illinois, had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto; and finding further that the other Respondent, A. M. Andrews Company of Oregon, hereinafter referred to as Respondent Oregon, had not engaged in any unfair labor practices, and was not responsible for the unfair labor practices in which Respondent Illinois had engaged and was engaging. Thereafter the Respondents filed exceptions to the Intermediate Report and a brief in support of these exceptions.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no

prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondents' exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modifications and additions:

1. In their exceptions and brief the Respondents request that the record be reopened to permit the introduction into evidence of additional data pertaining to the Respondents' financial condition. The data which the Respondents would introduce is set forth in detail in their exceptions. The Respondents assert that the introduction of such data would show that the Carterville plant was shut down and permanently abandoned solely because of economic necessity. The Respondents do not assert that the financial data they now seek to introduce into evidence was newly discovered. The only reason they assign for the failure to introduce it into evidence at the hearing is that "A. M. Andrews and John Tuttle, representatives of the Respondents, appeared at the hearing without benefit of legal counsel neither prior to or at the hearing and without an adequate understanding of the scope or purpose of the hearing."

After due notice, the hearing in this case was held on September 20, 1954. It had been originally scheduled for July 19 and had been rescheduled for August 16. As early as June 6, 1954, Respondent Illinois was notified that it had been charged with

the commission of the unfair labor practices here in issue. The complaint in this case was served on June 28, 1954; an answer to the complaint was received in the Regional Office on July 6, 1954. A second amended charge and an amended complaint was served on the Respondents on August 27, 1954. It does not appear, therefore, nor in fact do the Respondents assert, that the Respondents were not adequately apprised of the charges against them, or that they were deprived of the opportunity to prepare their defense. No request for an adjournment was made by the Respondents at the hearing for the reason that they were unrepresented by counsel, or for any other reason. The Respondents were granted ample opportunity at the hearing to present their defense. Indeed, during the course of the presentation of concluding arguments, after both the General Counsel and the Respondents had rested their cases, the Trial Examiner, over the General Counsel's objections, permitted the Respondents to introduce certain evidence pertaining to Respondents' financial condition which is set forth in the Intermediate Report. In these circumstances, especially in view of the fact that no assertion is made that the evidence the Respondents seek to introduce is newly discovered, we do not believe that the Respondents have shown adequate reason in support of their request to reopen the record, and the request is hereby denied.[1]

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[1] Basic Vegetable Products, Inc., 75 NLRB 815, 818; Vogue-Wright Studios, Inc., 76 NLRB 773, 778; The Sun Company of San Bernardino, California, 105 NLRB 515, 520.

We note, moreover, that even were we to permit the introduction into evidence of the financial data set forth in the Respondents' exceptions, we would not deem it of sufficient probative force to establish that the Carterville plant was shut down for economic reasons.[2] Like the Trial Examiner, we recognize that the Respondents were beset by financial difficulties. However, also like the Trial Examiner, and for the reasons indicated in the Intermediate Report, we are convinced that the plant's shutdown on June 1, 1954, was discriminatorily motivated, and was not the immediate result of the economic considerations the Respondents have advanced. The existence, therefore, of economic considerations which did not directly cause the plant's shut down, does not excuse the Respondents' discriminatory action.[3]

2. We find, in agreement with the Trial Examiner, that the Respondents form a multi-state en-

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[2] In rejecting, at this time, the Respondents' request to reopen the record, we do not now rule upon the materiality of the financial data set forth in the Respondents' exceptions upon either: (1) the issue as to the amount of work that would have been available to employees during the period June 1-August 3, 1954, but for the Respondents' discriminatory lockout of June 1; and (2) the corollary issue as to the amounts of back pay due the discriminatorily locked-out employees. These matters may properly be raised in the compliance stage of this proceeding.

[3] See N.L.R.B. vs. Norma Mining Corp., 206 F.2d 38, 44 (C.A. 4).

terprise whose combined out-of-state sales[4] are sufficient to meet the Board's recently announced jurisdictional standards.[5] However, we do not agree with the Trial Examiner's finding that the Respondents are separate employers, nor with the Trial Examiner's further finding that Respondent Oregon may not be held responsible for remedying the unfair labor practices here in question.

As set forth in the Intermediate Report, the President and principal stockholder of Respondent Oregon, with 345 shares, is A. M. Andrews. The other officers and stockholders of this corporation are: Alex Marshall, Vice-President, with 16 shares; Norman Brown, Secretary-Treasurer, with 1 share; and Ray H. Lesher, formerly Secretary, with 1 share. A. M. Andrews is also the President of Respondent Illinois, and owns 1 share, or 25 percent of its stock. John A. Tuttle, the nephew of A. M. Andrews, is its Vice-President, Norman Brown its Treasurer, and Ray H. Lesher, its Secretary. Each of the latter owns 1 share, or 25 percent of the stock of Respondent Illinois. Both Respondents manufacture plastic hose sprinklers. Respondent Oregon started operations in Oregon in 1951, while Re-

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[4] From June 30, 1953 to June 30, 1954, Respondent Oregon had $791,000 in out-of-state sales. During the period January 1, 1954 to June 30, 1954, its out-of-state sales were in excess of $210,000. Respondent Illinois, during the period April 27, 1954 to July 31, 1954, had $22,000 in out-of-state sales.

[5] Jonesboro Grain Drying Corporation, 110 NLRB No. 67.

spondent Illinois began actual manufacturing operations at Carterville, Illinois, on April 27, 1954.

Before Respondent Illinois commenced its operations, A. M. Andrews personally contacted a committee of Carterville business men. As a result of Andrews' negotiations with this committee, an agreement was reached whereby the town erected a building for the use of Respondent Illinois. To operate the plant at Carterville, John Tuttle, James Paterson and Milo Smith were transferred from the Portland plant of Respondent Oregon. Tuttle was named managing agent of the Carterville plant; Paterson and Smith set up the equipment and trained the personnel. Paterson subsequently assumed the duties of the plant's production foreman. Tuttle, the managing agent, reported directly to Andrews; and Andrews handled the labor relations problems for both Respondents. It was Andrews, moreover, who, after conferring with the other officers of the Oregon corporation, ordered the Carterville plant closed on June 1, 1954. Respondent Oregon furnished the credit for Respondent Illinois by guaranteeing the latter's purchases. Raw materials used by the Carterville plant was carried on the books of Respondent Oregon corporation as an account receivable. When the Carterville plant was dismantled on August 3, 1954, all its raw materials, finished products and machinery were shipped to, and taken over by, Respondent Oregon.

In determining that the Respondents are separate employers and that therefore Respondent

Oregon was not responsible for the unfair labor practices committed at the Carterville plant, the Trial Examiner did not advert to a number of factors of paramount significance. These are: (1) the fact that both Respondents are engaged in manufacturing and selling the same product, and have almost identical names; (2) the fact that A. M. Andrews is the virtual owner of Respondent Oregon, and together with his nephew owns 50 percent of the stock of Respondent Illinois; (3) the fact the officers in both corporations are virtually the same; (4) the fact that the Respondent Oregon lent its credit to Respondent Illinois in the acquisition by the latter of raw materials and machinery—thereby providing the very means whereby the Respondent Illinois could operate; (5) the fact that after the shutdown of the Carterville plant, the raw materials and physical assets of Respondent Illinois were turned over to Respondent Oregon, presumably to be disposed of as the latter might direct; (6) the fact that the labor relations of both corporations were controlled by the same person, the aforementioned A. M. Andrews; and (7) the fact that A. M. Andrews demonstrated his practical control over Respondent Illinois by himself making the vital decision to shut down operations at Carterville. The existence of these factors demonstrates the close integration of the Respondents. They show further, and we so find, that the Respondents constitute a single employer within the meaning of the

Act.[6] It follows therefrom, and we also find, that Respondent Illinois is an integral part of a multi-state organization, and that Respondent Oregon is responsible for remedying the unfair labor practices herein found to have been committed.[7]

The Remedy

As the Respondents have engaged in unfair labor practices, we shall order that they cease and desist therefrom. In order to effectuate the policies of the Act, we shall also order that the locked-out employees be made whole for losses of pay they suffered between June 1, 1954, the date of the shutdown of the Carterville plant, and August 3, 1954, the date of the plant's permanent closing; and that the Respondents offer reinstatement to the locked-

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[6] Don Juan Co., Inc., 79 NLRB 154, 155, enforced 178 F.2d 625, 627 (C.A. 2); N.L.R.B. vs. Federal Engineering Co., 153 F.2d 233 (C.A. 6); N.L.R.B. vs. Condenser Corp., 128 F.2d 67, 71 (C.A. 3); Somerset Classics, Inc., 90 NLRB 1676, enforced 193 F.2d 613 (C.A. 2); Milco Undergarment Co., Inc., 106 NLRB 767, enforced 212 F.2d 801 (C.A. 3); Wright & McGill Company, 102 NLRB 1035. Cf. N.L.R.B. vs. Stowe Spinning Co., 336 U.S. 226, 227.

[7] In view of our determination that the Respondents constitute a single employer within the meaning of the Act, we do not deem it necessary to consider the Trial Examiner's assumption that the Board may apply one standard in judging corporate-interrelationship for the purpose of asserting jurisdiction and a different one in judging corporate-interrelationship for the purpose of remedying unfair labor practices.

out employees in the event that the Respondents resume operation in Carterville, or in the event that the Carterville operations are resumed elsewhere.

Our dissenting colleague would also order Respondent Oregon to place the Carterville employees on a preferential hiring list at the Oregon plant. We believe, however, that in view of the circumstances of this case, such an extension of the remedy is not warranted. In the first place, the Carterville operation appears to have been a localized venture in a geographical area widely separated from that of the Oregon plant. Secondly, and even more significantly, the permanent closing of the Carterville plant was not discriminatorily induced, but was rather, as the Trial Examiner found and as our dissenting colleague apparently concedes, the result of economic considerations. Certainly, therefore, in the normal course of events, the Carterville employees would have had no expectation of employment with the Respondents after August 3, 1954.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act as amended, the National Labor Relations Board hereby orders that the Respondents, A. M. Andrews Company of Oregon, and A. M. Andrews of Illinois, Inc., their officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in International

Association of Machinists, AFL, or in any other labor organization of their employees, by shutting down plants and locking out their employees, or in any other manner discriminating in regard to their hire or tenure of employment or any term or condition of employment;

(b) Announcing that they will not tolerate a union in their plant, threatening to move their plant to discourage union activity, and conducting polls of their employees to procure their renunciation of support for International Association of Machinists, A.F.L., or any other labor organization; and

(c) In any other manner interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act.

(a) Make whole the employees whose names are listed in Appendix A of the Intermediate Report in the manner prescribed in the section of the Intermediate Report entitled "The remedy;"

(b) In the event of the resumption of their operations at Carterville, Illinois, or in the event that the Carterville operations are resumed elsewhere, offer to the employees whose names are listed in Appendix A of the Intermediate Report immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges; and in the event such operations are resumed at a location which is not in the immediate vicinity of Carterville, offer to pay the employees any necessary and reasonable expense of moving themselves, their families, and their household effects to the vicinity of the plant where operations are resumed and in which said employees are offered reinstatement;

(c) In the event operations are resumed at Carterville, or elsewhere, post in their plant copies of the notice attached hereto and marked Appendix B.[5] Copies of said notice, to be furnished by the Regional Director for the Fourteenth Region, shall, after being signed by Respondents' representative, be posted by Respondents immediately after resumption of operations and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said

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[5] If this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "A Decision and Order" the words "A Decree of the United States Court of Appeals Enforcing an Order."

notices are not altered, defaced, or covered by any other material; and

(d) Notify the Regional Director for the Fourteenth Region, in writing, within ten (10) days from the date of this Order, what steps Respondents have taken to comply herewith.

Dated, Washington, D. C., May 10, 1955.

[Seal] GUY FARMER, Chairman
IVAR H. PETERSON, Member
PHILIP RAY RODGERS, Member
National Labor Relations Board

Abe Murdock, Member, concurring in part and dissenting in part:

I am in full agreement with the main opinion except for the order which I believe is inadequate fully to remedy the unfair labor practice found.

Paragraph 2(b) of the Order is not broad enough to provide an effective remedy for discriminatory lockout of the Carterville employees which the Board finds took place when the Carterville plant was shut down. The Respondents are merely told in the cease and desist portion of the Order not to do this any more; and in the affirmative portion of the Order to reinstate the locked out employees only if the Carterville plant is reopened or those operations are resumed elsewhere. If these operations are permanently abandoned, there has been no effective remedy. Inasmuch as the Board has found above (1) that Respondents Oregon and Illinois are a single employer, and (2) that Respondent Oregon

"is responsible for remedying the unfair labor practices found to have been committed," I believe it only logical that Respondent Oregon be required to place the Carterville employees on a preferential list for employment at the Oregon plant in preference to any new hires at the plant. Accordingly, I would broaden the Order to that extent and disagree with the present narrow form.

Dated, Washington, D. C., May 10, 1955.

ABE MURDOCK, Member
National Labor Relations Board

[Printer's Note: Appendix B is similar to Appendix B set out at pages 27-29 of this printed record.]

Affidavit of Service by Mail and Return P. O. Receipts attached.

In the United States Court of Appeals
for the Ninth Circuit

No. 14866

A. M. ANDREWS COMPANY OF OREGON and A. M. ANDREWS OF ILLINOIS, INC.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled "A. M. Andrews Company of Oregon and A. M. Andrews of Illinois, Inc., and International Association of Machinists, AFL," the same being known as Case No. 14-CA-1208 before said Board, such transcript includes the pleading and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic transcript of testimony taken

before Trial Examiner George A. Downing on September 20, 1954, together with all exhibits introduced in evidence.

(2) Copy of Trial Examiner Downing's Intermediate Report and Recommended Order dated October 28, 1954; order transferring case to the Board, dated October 28, 1954, together with affidavit of service and United States Post Office return receipts thereof.

(3) Petitioners'[1] exceptions to the Intermediate Report and Recommended Order including request that the record be reopened, received December 6, 1954. (Petitioner's request to reopen the record denied, See Decision and Order, page 2.)

(4) Copy of Decision and Order issued by the National Labor Relations Board on May 10, 1955, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 5th day of October, 1955.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National Labor Relations Board

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[1] Respondent before the board.

[Title of U. S. Court of Appeals and Cause.]

SUPPLEMENTAL CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—series 6, as amended, hereby certifies that the document annexed hereto, namely, Petitioners'[1] request for extension of time to file exceptions to Intermediate Report and Recommended Order of Trial Examiner, and brief in support of said exceptions, is a part of the record in the above-entitled matter previously mailed to this Court on October 5, 1955.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 25th day of October, 1955.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National Labor Relations Board

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[1] Respondents before the Board.

Before the National Labor Relations Board
Fourteenth Region

Case No. 14-CA-1208

In the Matter of A. M. ANDREWS OF ILLINOIS, INC., and INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL.

TRANSCRIPT OF PROCEEDINGS

Hearing Room, U. S. Court House and Custom House, St. Louis, Missouri, Monday, September 20, 1954.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock, a.m.

Before George A. Downing, Esq., Trial Examiner.

Appearances: John A. Tuttle, 4621 Beaverton Hillsdale Highway, Portland 19, Oregon, appearing on behalf of the Respondent, A. M. Andrews of Illinois, Inc. A. M. Andrews, 4621 Beaverton Hillsdale Highway, Portland 19, Oregon, appearing on behalf of the Respondent, A. M. Andrews of Illinois, Inc. William F. Trent, Esq., 1114 Market Street, St. Louis, Mo., appearing as Counsel for General Counsel, National Labor Relations Board.

* * * * *[1*]

Exam. Downing: In other words, you are reasonably satisfied with the figures you have in the stipulation.

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Mr. Trent, would you be satisfied with the word approximately instead of "more or less"?

Mr. Trent: Yes, sir.

Exam. Downing: Would you be satisfied with that Mr. Andrews?

Mr. Andrews: Yes, sir.

Exam. Downing: Then may it be understood, may it be stipulated that the stipulation be amended to use the words "approximately" wherever the words "more or less" appears in it.

Mr. Andrews: That's agreeable with me.

Mr. Trent: I am agreeable with that.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Exam. Downing: May I see the stipulation.

Mr. Trent: General Counsel's exhibit, marked for identification as Exhibit No. 2, is the stipulation in regard to the commercial facts at the Company's Oregon establishment.

Exam. Downing: Very well, the stipulation will be received with the amendment which has just been made and stipulated to.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification was received in evidence.) [25]

[See page 96.]

Exam. Downing: Off the record.

(Discussion off the record.)

Exam. Downing: On the record.

Proceed, Mr. Trent.

Mr. Trent: Would you mark this exhibit 2-B,

and mark the other one, then, 2-A, so that the record will be clear, 2-A are the commercial facts in regard to the company's Oregon establishment and 2-B are the commercial facts in regard to the company's Illinois establishment.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2-B for identification and the document originally marked as Exhibit 2 was marked 2-A.)

[See page 96.]

Mr. Trent: I would like to offer Exhibits 2-A which are the commercial facts on the companies original establishment and 2-B which is the commercial facts on the company's Illinois establishment.

Exam. Downing: That is with the amendment?

Mr. Trent: Yes.

Exam. Downing: I have already received 2-A, does 2-B also carry the terms "more or less"?

Mr. Trent: Yes, sir.

Mr. Downing: To which you object and you will be satisfied with the word "approximately"?

Mr. Trent: I will.

Exam. Downing: Are you agreeable to the amended stipulation, [26] Mr. Andrews?

Mr. Andrews: Yes, sir.

Exam. Downing: Exhibit No. 2-B will be received in evidence with the agreement that the words "more or less" will be changed to "approximately", wherever they appear in the stipulation.

[See page 99.]

* * * * * [27]

A. M. ANDREWS

a witness called by and on behalf of the General Counsel, being [101] first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Trent): State your name please.

A. A. M. Andrews.

Q. What is your address?

A. Business or residence?

Q. Your residence.

A. 8410 Southwest Milon Lane, Portland, Oregon.

Q. What is your title at the Oregon Corporation, what title are you employed there, in what capacity are you employed? A. General manager.

Q. Aren't you President of that corporation?

A. I am President of the A. M. Andrews Company, Illinois.

Q. Are you President of the A. M. Andrews Company, of Oregon, also? A. Yes, sir.

Q. How many shares of stock do you own in that company, Mr. Andrews?

A. Oh, I don't know, about, just guessing about 80 percent.

Exam. Downing: Isn't that speculative?

Mr. Trent: All right, sir, it isn't a percentage but——

Q. (By Mr. Trent): What is your title at the Illinois Corporation? A. President.

Q. President of the Illinois Corporation. Now, Mr. Andrews, [102] what is manufactured at your

(Testimony of A. M. Andrews.)

establishment in Oregon, what is manufactured there? A. Plastic Hose Sprinklers.

Q. Was the same thing manufactured at the Carterville establishment? A. Yes, sir.

Q. Who is your managing agent, who was at the time of the shut-down at the plant at Carterville, Illinois? A. John Tuttle.

Q. To whom did Mr. Tuttle report?

A. To the Board of Directors.

Q. Who does he report directly to, does he report directly to you as President? A. Yes.

Q. Who handles the labor relations problems, if any, at your Oregon establishment?

A. We don't have any.

Q. If you had any, who would handle them, Mr. Andrews, if you had any?

A. Well, I don't know about something that we never had. We never had to hire anyone for that reason.

Q. You do consider yourself as the man who would handle any labor relation problems at both establishments, do you not?

A. Well, naturally, to go along with the policy I have followed.

Exam. Downing: Is Mr. Tuttle still with your company? [103]

The Witness: He is with the Portland Company, he came back to Portland, he is with us in Portland.

Q. (By Mr. Trent): Who was the man who gave

(Testimony of A. M. Andrews.)

the final orders as to the closing the Carterville, Illinois, establishment?

A. It was possibly three.

Q. I mean who were those three?

A. Well, we talked it over and Norm Brown, he is the Treasurer and Office Manager and Jake Longcor.

Q. Who would have the final say so, would you have had the final say so?

A. I don't take the bull by the horn and do as I please, it's policy, has to be set, I listen to other people and we talk it over.

Q. You and Mr. Brown talked it over?

A. Yes, and Mr. Longcor.

Q. And then as a result of that you gave Mr. Tuttle orders to shut it down, is that correct?

A. Yes, for the time being, that is it was a temporary shut-down.

Exam. Downing: Temporary shut-down?

The Witness: That was our viewpoint at the time, you will find that there has been conditions that has happened, and that changed the picture.

Q. (By Mr. Trent): When was the plant in Oregon first established, Mr. Andrews, approximately? [104] A. The Oregon plant?

Q. Yes, sir, the parent plant, when was it started? A. The corporation?

Q. Your hose manufacturing plant in Oregon, do you recall what year, I don't care about the exact moment.

(Testimony of A. M. Andrews.)

A. Well, I made the first sprinkler in '51, but I didn't start production until '52, that is, for resale.

Q. That is in Oregon? A. In Oregon, yes.

Q. When was your subsidiary plant in Carterville started, do you recall when that was started?

A. We negotiated there a year ago last Fall, that is for the building, we negotiated for it.

Q. Do you remember what month the production actually started in your subsidiary plant in Carterville?

Mr. Andrews: Have you got the date John?

Mr. Tuttle: 27th of April, 1954.

A. That was production.

Mr. Tuttle: That was when we started training personnel.

Mr. Trent: When did production take place?

Mr. Tuttle: When you are training people, you are building sprinklers, aren't you?

Mr. Andrews: But I sent two men from Portland here, that were acquainted with the operations of machines and understood the assembly and operation of them. I sent them there to train [105] and get the equipment set up because no one knew it here.

Q. (By Mr. Trent): By here, Mr. Andrews, you refer to Carterville, Illinois? A. Yes.

Q. Who were those two people?

A. Milo Smith and Jimmie Paterson.

Q. He was the production foreman, you might say?

A. He was, he had no official capacity.

(Testimony of A. M. Andrews.)

Exam. Downing: Where did you get Mr. Tuttle from?

The Witness: Portland.

Exam. Downing: He came here from Portland also?

Q. (By Mr. Trent): Mr. Tuttle is your nephew is he not? A. Yes.

Exam. Downing: Which company is Mr. Tuttle connected with, the Oregon Company?

The Witness: Oregon.

Q. (By Mr. Trent): Who did you negotiate with, Mr. Andrews, in order to put the plant in Carterville? You mentioned negotiating, do you recall with whom you negotiated with?

A. Well, the first, first it was Godfrey Hughes in Southern Illinois, Inc., he was interested in getting industry there, he wouldn't influence it for one location over another, he had to be wholly impartial and unbiased to all towns. It was up to us to decide what location we would take and this community made us an offer, they were very anxious for us to come in there [106] and they—the unemployment situation was pretty bad, they said there was around 250,000 people within a 25 mile radius of Carterville, although there was stated only 3,000 people in Carterville, but they assured us of a plentiful supply of labor.

Exam. Downing: Who was on the committee for the town?

The Witness: There was Lee Hooker, Mack Steffes, Mr. Hayton, and Paul Dorcy.

(Testimony of A. M. Andrews.)

Exam. Downing: Did the town own the building?

The Witness: No, they erected the building, I told them as the tax situation is today a new business is hard to gain capital for operations and as far as being able to build a building it was impossible for us to build one.

Exam. Downing: Who did build it?

The Witness: This industrial group in Carterville. They held some dinners and they donated the money and Mr. Steffes furnished all the material at cost and they put the building up and then we signed a purchase agreement on the building that it would revert to us after a period of time.

Exam. Downing: Was that industrial group represented by the same committee, Hayton, Hooker, Steffes, and so forth?

The Witness: That's right.

Q. (By Mr. Trent): Mr. Andrews, did you personally contact for the negotiations with these men or was it done by letter and telephone? [107]

A. I came down personally and signed the first agreement and the lease agreement was signed later, after the building was put up.

Q. You personally signed a consent election agreement, did you not? A. Yes.

Q. I believe it was June the 8th, is that correct, you were down again and signed that personally?

A. As far as I remember, yes.

May I retract a statement. There was a statement made, at least it left the impression that I said the building was for rent as of the date that we shut

(Testimony of A. M. Andrews.)

down. I have never said anything of that nature, because we anticipated continuing on through but as you probably learned, later that has changed.

Q. Correct me if I was wrong. That statement was reputed to have been made by Mr. Godfrey Hughes.

A. That is right but I have no control over what he said.

Q. I don't think that any witness said you made that statement but several witnesses said that Godfrey Hughes said that. A. Yes.

Exam. Downing: The record will show that.

Mr. Trent: I think the record will show it.

The Witness: Yes.

Q. Thank you.

Mr. Trent: That is all. [108]

Exam. Downing: What date was it that you closed down the plant at Carterville?

Mr. Tuttle: Which time, sir?

Exam. Downing: Finally.

I will have to ask Mr. Andrews that, he is on the stand, do you know?

The Witness: I couldn't give you the date, I think you are referring to the time when we made the decision to move the equipment out.

Exam. Downing: Well, there has been testimony about a shut-down on June 1st, testimony also shows that sometimes after that the plant may have operated on a limited basis. When did you finally close down, do you know?

(Testimony of A. M. Andrews.)

The Witness: I don't believe there was any production after June 1st, was there?

Mr. Tuttle: Was production to the point——

Mr. Trent: I am going to object to that.

Exam. Downing: At the present time he is making a statement as the company's representative. It's not testimony than any other statement he is making.

Mr. Tuttle: Because we were low on some sizes of sprinklers, but the actual date of that I don't know, we just worked a few days to make a few sizes of the sprinklers.

Exam. Downing: When did the plant finally close, Mr. Andrews? [109]

The Witness: Can't give you that.

Mr. Tuttle: Third of August.

The Witness: Third of August.

Exam. Downing: Between June first and the third of August, had you done anything about disposing of your assets?

The Witness: No, sir, we did not.

Exam. Downing: After the third of August did you do anything about disposing of your assets at that plant?

The Witness: We moved all equipment and the inventory to Portland.

Exam. Downing: To Portland?

The Witness: Yes.

Exam. Downing: The Oregon company took it over?

The Witness: That's right, even the inventory

(Testimony of A. M. Andrews.)

of finished sprinklers, you see, when we closed the plant down we had over——

Mr. Tuttle: Twelve hundred and fifty dozen.

The Witness: (Continuing) ——twelve hundred and fifty dozen sprinklers here.

Exam. Downing: On hand?

The Witness: That's right and our inventory was getting so large that—and the season has been off——

Exam. Downing: Anyway, you took all those assets and put them in the Oregon company?

The Witness: Yes.

Exam. Downing: What sort of bookkeeping arrangement did [110] you make to show the transfer from one company to the other?

The Witness: We carried the inventory of raw materials for Carterville, the majority of items such as plastic we carried that and we had to guarantee the payment on that through our Portland corporation, to the suppliers, they wouldn't give the Carterville, Illinois, plant the credit.

Exam. Downing: So the Portland, your Oregon company has been furnishing your credit for the Illinois corporation?

The Witness: That is right.

Exam. Downing: Did you finally liquidate the Illinois company or is it still unliquidated?

The Witness: The corporation is not liquidated.

Exam. Downing: But the Portland company has all of the assets?

The Witness: Yes, sir.

(Testimony of A. M. Andrews.)

Exam. Downing: What sort of bookkeeping entries have you made to show the transfer from one company to the other company?

The Witness: The Illinois Corporation is completely separate in bookkeeping.

Exam. Downing: I understand that, but I am trying to find out how, on the books of the two companies, did you transfer the assets from one to the other?

The Witness: The plastic was the biggest item, that was carried on the books as an accounts receivable by the Portland Company, and then when we liquidated we brought that back to [111] clear up those accounts.

Exam. Downing: Anyway, the Oregon company took over the accounts receivable of the Illinois company?

The Witness: That is still held separate, isn't it?

Mr. Tuttle: I believe it is still held separate.

Exam. Downing: Who is the ones that are doing the checking?

The Witness: We are in Portland, through the Carterville corporation, until the accounts receivable are cleaned up.

Exam. Downing: Did the Illinois company leave any accounts payable?

The Witness: No, nothing that amounted to anything.

Exam. Downing: How have they been handled?

The Witness: Through the advance of the money from the Portland Corporation.

(Testimony of A. M. Andrews.)

Exam. Downing: Do the two companies have a single auditor or bookkeeper?

The Witness: Single auditor, same auditor, Ray Lecher handles the auditing for both companies.

Exam. Downing: Is there a single bookkeeper?

The Witness: The bookkeeping in Carterville was all done in Carterville and the auditing would be done in Portland.

Exam. Downing: What about now? Is the bookkeeping done by the same person?

The Witness: It's being consolidated by the same person in Portland. [112]

Exam. Downing: Was the machinery all shipped back to Oregon?

The Witness: Yes, sir.

Exam. Downing: That is being held by the Oregon Company?

The Witness: That is right.

Exam. Downing: Is it using the machinery?

The Witness: No, it's in storage.

Exam. Downing: In the name of the Oregon company?

The Witness: Yes. That machinery was never paid for, by the way.

Exam. Downing: The Oregon company was liable for it?

The Witness: Yes.

Exam. Downing: So, in effect, the Oregon company is holding the machinery for the security of the guarantee?

The Witness: Yes.

(Testimony of A. M. Andrews.)

Exam. Downing: Anything further?

Mr. Trent: I believe that is all at this time.

Exam. Downing: Anything further?

That is all.

(Witness excused.) [113]

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Exam. Downing: Hearing will be in order. Are you ready Mr. Andrews?

Mr. Andrews: I would like to read this into the record, it is dates and figures here. This shut down——

Exam. Downing: Just a moment. Do you intend that to come in as evidence. It can come in as evidence and we will reopen the record.

Mr. Andrews: I think it is good as argument as far as I am concerned. We started training plant personnel in April of 1954 and at the time we started we only had four or five people and gradually built this up to 35 women and five men. During [125] this period of training we built up an inventory of 850 dozen sprinklers and the home office in Portland was advised of this inventory and they suggested that we shut down the plant until the stock started to move to market, as we sell a very seasonable product. We shut down the plant on May 11, and did not reopen until May 26th. Now, in reference to this shutting down, Mr. Tuttle had placed the same kind of notice on the bulletin board the second time as he had on the earlier shut down.

Exam. Downing: I don't think that has been established by the evidence, has it?

Mr. Andrews: No, sir.

Mr. Andrews: And then the June 1st shutdown was the same thing, it fell on a Tuesday, and the reason they were paid up in full at that time was because it was the end of their week and we didn't know how soon they would be coming back and we would be going into production.

Exam. Downing: When is the end of your work week pay period?

Mr. Andrews: Tuesday.

Mr. Tuttle: Monday or Tuesday, I know there was the holiday there and we didn't pay on Monday.

Exam. Downing: Is Tuesday the regular pay day?

Mr. Tuttle: I think it was, yes.

Mr. Trent: I want to make it clear for the record that I am objecting to any of this going in as evidence. [126]

Exam. Downing: It can't go in as evidence unless you want to reopen the record and take the stand and testify to it.

Mr. Andrews: Maybe we better put it into the record.

Exam. Downing: Maybe you better move to reopen the record.

Mr. Andrews: I move that we reopen the record.

Exam. Downing: I will grant the motion to reopen the record.

Mr. Trent: I object to the reopening of the record for the witness after the testimony was in for both

cases. Both parties have stated that they have rested their case and that the General Counsel has argued his case and after the argument of General Counsel, we strenuously object.

Exam. Downing: I realize, of course, that it is most unusual, however, the Respondents here are not represented by counsel. You are not a lawyer?

Mr. Andrews: No, sir.

Exam. Downing: Under those circumstances I will grant that indulgence despite the strenuous objection of the General Counsel.

Mr. Trent: My answer to that is that even though he isn't a lawyer there are plenty of good lawyers available and are not too busy and I don't think that the fact that he doesn't have a lawyer is irrelevant.

Exam. Downing: My ruling is that if you wish to take the stand and testify you may, do you want to Mr. Andrews?

Mr. Andrews: I do, sir. [127]

Exam. Downing: All right sir, you will be on the same oath as you were a little while ago, subject to cross-examination.

A. M. ANDREWS

having been previously sworn, resumed the stand and testified as follows:

Direct Examination

Exam. Downing: Suppose you state your name for the record.

The Witness: In—A. M. Andrews.

(Testimony of A. M. Andrews.)

In regard to the shutdown I wish to state that as our product was very seasonable and we had built up an inventory of 850 dozen sprinklers on May 11, 1954, on that date we stopped production and laid off the employees until we reopened on May the 26th, 1954.

Exam. Downing: Was any notice given on May 11?

The Witness: On May 11, the same was given.

Exam. Downing: Did you post a notice?

Mr. Andrews: There was a notice posted on the bulletin board.

Exam. Downing: Was it in writing?

The Witness: It was in writing.

Exam. Downing: Do you have a copy of it?

Mr. Andrews: We don't have a copy of it.

Exam. Downing: You weren't present were you?

Mr. Andrews: No, Mr. Tuttle was.

Exam. Downing: I don't see how you can testify then what [128] was in the notice then. Go ahead.

Mr. Trent: Understand that I am objecting to this whole thing.

Exam. Downing: I understand that the record shows that clearly.

Mr. Andrews: We reopened again in May 26, 1954.

Exam. Downing: May 26th would be on a Wednesday wouldn't it?

Mr. Trent: That is correct.

Exam. Downing: You opened then on the 26th,

(Testimony of A. M. Andrews.)

the 27th and on the 28th, three days did you not?

Mr. Andrews: Yes, sir.

On Friday, May 28th, we had built up our inventory to 1250 dozen sprinklers. As Monday was a holiday, Memorial Day, I decided to give the workers a paid holiday and one day's work on Tuesday and then close once again until the inventory was cut down, however, on Tuesday I received a letter from Mr. Hubert Rushing advising me that the International Machinists were the bargaining agents for the people in the plant. At this time I went ahead and closed the plant as planned and advised, we were advised to do that from Portland due to the inventory. An election was held by the workers of A. M. Andrews——

Exam. Downing: That is duplicative. You are qualified to testify only to testify to what you know of your own knowledge. Did you get Mr. Rushing's letter in Portland? [129]

Mr. Andrews: We got a copy in Portland.

Mr. Tuttle: I have the original.

Exam. Downing: You got a copy on June 1st?

Mr. Andrews: Yes, sir. I think it was after that——

Mr. Tuttle: I got the original on June 1st.

Mr. Andrews: Also, of this 1250 dozen sprinklers that we had in inventory in Carterville, there were 600 and some odd dozen that we shipped back to Portland that were never moved out of the Carterville plant for the reason that there was a lack of orders and we have the financial statement showing

(Testimony of A. M. Andrews.)

the condition of the Carterville plant and the Portland plant, if that is of any interest.

Exam. Downing: It's up to you, you are putting up your case, I don't know whether it will be interesting or not.

Mr. Andrews: We gave you the figures in this, what do you call it, stipulation.

Exam. Downing: You are speaking to Mr. Trent now, let the record show that.

Anything further?

Mr. Andrews: Let me see, just a minute.

That is all.

Exam. Downing: Any cross examination?

Mr. Trent: Just a few questions.

Cross Examination

Q. (By Mr. Trent): You stated that you had 850 sprinklers on May 11th—— [130]

A. That is correct.

Q. (Continuing): In your inventory, so you stopped? A. That is correct.

Q. You gave a notice to the employees at that time, did that not state the reasons why you were closing down at that time?

A. No, all I know is what he told me and I saw the notice in Carterville.

Exam. Downing: Where is the notice now?

Mr. Andrews: It was on the bulletin board.

Exam. Downing: Where is it now?

Mr. Andrews: I suppose it is all torn off the bulletin board.

(Testimony of A. M. Andrews.)

Q. (By Mr. Trent): Now, how much inventory did you have on May 26, you had 850 on May 11.

A. One thousand two hundred and fifty dozen.

Mr. Tuttle: Wait a minute, no.

Exam. Downing: Just a minute, Mr. Andrews is testifying, let's keep this straight if possible.

Mr. Tuttle: That is what I was trying to do, sir.

Exam. Downing: I know but Mr. Andrews will have to testify.

Q. (By Mr. Trent): Did you have a high inventory on May 26th?

A. On May 26th, I don't know what, when he shut down it was 850 dozen that day and then on May 28, we had built the inventory up to 1250 dozen.

Q. That isn't responsive to my question. [131]

Did you have a high inventory on Wednesday, May 26, 1954, that is what I am asking you?

A. Yes.

Q. You did. Then, why did you decide that day to start back into operations if you had a high inventory?

A. Did not reopen until May 26th.

Q. Yes, sir, you did open on May 26th, you said you had a high inventory on that day. Why did you decide to reopen on that day?

A. We shut down on May 11.

Q. But you still had a high inventory on May 26th, why did you start on that particular day to reopen the plant?

(Testimony of A. M. Andrews.)

A. I don't know what the inventory was, it was——

Q. Certainly you must have known when you started back, started the plant, why did you start?

A. We were out of some sizes.

Q. So then the inventory was low on Wednesday, May 26th, is that right? A. Yes.

Q. Then are you telling me that by three days, Wednesday the 26th, Thursday the 27th and Friday the 28th that it had gone from a low to so high that you had to close the plant again, is that your testimony? A. That is my testimony, sure.

Q. What was it on May 26th? [132]

A. I don't have the figures.

Q. What was it on May 27th?

A. I don't have the figures.

Q. What was it on May 28th?

A. 1250 dozen.

Q. That is what it was on June 1st, isn't it?

A. Well, that is practically the same.

Q. 1250 dozen? A. Yes, sir.

Exam. Downing: Didn't make any on June first, didn't produce any?

Q. (By Mr. Trent): Didn't they produce anything on June 1st?

A. If they was working they did, yes.

Q. Then it was more than that wasn't it, Mr. Andrews, is this your testimony that you don't know what your inventory was on May 26th, on Thursday, May 27th, you don't know what it was on Fri-

(Testimony of A. M. Andrews.)

day, May 28th, but you know what it was on June first, 1250 dozen?

A. I know that is what it was when we shut down, yes, sir.

Q. That was after you received the notice from the union, was it not? A. Yes, it was.

Q. Mr. Andrews, do you recall——

A. I hadn't received a written notice by that time.

Q. You received notice from Mr. Tuttle? [133]

A. Yes, because he received it.

Exam. Downing: When he received that original from the union he called you right away didn't he, on June 1st?

Q. (By Mr. Trent): Mr. Andrews, do you recall a telephone conversation that you had with Mr. Godfrey Hughes when he was speaking from the Carterville, Illinois, or rather when he was speaking from Carterville, Illinois, and you were speaking from Portland, Oregon, on June 1st, 1954, do you recall that conversation?

A. I remember having a phone conversation with him, yes.

Q. Do you remember what occurred at that conversation, what did Mr. Hughes say to you, strike that.

Exam. Downing: Let's have one question at a time.

Q. (By Mr. Trent): Where did he call you from?

A. Carterville.

Q. From where was he talking?

A. I don't know.

(Testimony of A. M. Andrews.)

Q. How do you know it was from Carterville?

A. That is where the call came from.

Q. Very well, what was said, what did he say to you at that time, Mr. Andrews, what was the purpose of that call?

Exam. Downing: What did he tell you was the purpose of the call?

Mr. Andrews: The fact is it was so long ago I couldn't give you exactly anything much in regard to the phone conversation. [134]

Q. (By Mr. Trent): I will see if I can refresh your recollection just a little bit, Mr. Andrews. I have a statement here, was this your signature appearing on this statement (indicating), on page 2?

A. Yes.

Q. This is a two-page statement here, this is the first page and here is the second. Now, I will read this——

Exam. Downing: Just a minute, has he identified it?

Mr. Trent: I said it was his signature.

Mr. Andrews: Looks like mine, yes.

Q. (By Mr. Trent): I will read you this sentence and see if you can recall that.

Exam. Downing: Let him read that, I prefer not to have this into the record until he has properly identified it.

Mr. Trent: Would you read this, starting here?

Mr. Andrews: "I recall was the conversation"——

(Testimony of A. M. Andrews.)

Exam. Downing: Just read it to yourself, please, Mr. Trent will then question you about it.

Mr. Andrews: Yes.

Q. (By Mr. Trent): Now, this statement, do you recall the statement you made to myself when I was down there: "I have sworn to before me this 8th day of June '54" and on the first page, page 1, the yellow handwritten statement, you stated I recall a conversation on June 1st, 1954, between a Mr. Godfrey [135] Hughes and myself, did you make that statement? A. Yes.

Q. That is true then? A. Yes.

Q. The conversation was long distance "as I was in Portland, Oregon", is that correct?

A. Yes.

Q. "Mr. Hughes called me and tried to persuade me to keep the plant running for two or three days more, as a labor union here was trying to organize the plant and he felt that if the employees carried on he could straighten out some union trouble here" did you make that statement?

A. I didn't make it to you, you wrote out what you wanted and I signed it.

Q. You signed the statement?

A. You just wrote out the statement.

Q. Did you make this, did you sign this statement too, "He requested authorization for me to tell John Tuttle not to shut down but I would not let a labor union dictate my financial plans and I told him I would not give him such authority and we were going to close down"?

(Testimony of A. M. Andrews.)

A. That is true, the inventory was so large so why should I satisfy someone that is not connected with the corporation, why should I operate the plant to satisfy someone else?

Q. "I then called Mr. Tuttle to shut down the plant", is that [136] correct? A. Yes.

Q. Is this statement true "I have read the above statement consisting of two handwritten pages and swear that it is true and correct to the best of my knowledge", I believe that was on there when you signed it? A. I don't know.

Q. You read it over when you signed it?

A. I certainly did.

Q. Very well, or you wouldn't have signed it?

A. Sure.

Q. Now, then, you don't deny that, saying that Mr. Hughes, to paraphrase this, tried to persuade you to keep the plant open for two or three more days and he felt that he could straighten out some of the union trouble and he requested from you to tell John Tuttle not to shut down, is that correct?

A. Yes.

Q. And in reply you stated that you would not let a labor union dictate your plans to you and that you would not give him such authority to tell John Tuttle not to shut down, is that correct?

A. That is true enough, you can't have any labor union or—you can't go out and tell somebody to start their business or how much inventory they should carry——

Exam. Downing: Anything further? [137]

Mr. Trent: Just a moment. I believe that is all.

(Witness excused.)

Exam. Downing: Do you have any further evidence Mr. Andrews?

Mr. Andrews: We have a financial evidence here that is of the Carterville plant.

Mr. Trent: I want to object to that on the same grounds as I have previously stated.

Mr. Andrews: I am trying to establish——

Exam. Downing: Just a moment. Let me inquire, do I understand that you have furnished a copy of that to General Counsel, which served as a stipulation for evidence?

Mr. Andrews: Yes, sir, except Carterville figures here, this shows how much money we sunk into Carterville up to the 31st of May, $71,859.78.

Mr. Trent: We have no stipulation on that, sir.

Exam. Downing: Have you had a copy of that statement?

Mr. Trent: No, sir, I don't have.

Exam. Downing: Why don't we take a few minutes off the record here while you examine what he has got and see if you have any objections to that?

Off the record.

(Short recess.)

Exam. Downing: You may proceed.

Mr. Trent: We have conferred with this offer, firstly, it [138] is not the best evidence, it is not an authentic report from the records, it has not been audited, secondly, it is being submitted now after the close——

Exam. Downing: You needn't make that point again, let's get down to the exhibit itself.

Mr. Trent: That is my objection.

Exam. Downing: I wouldn't be able to receive that, I doubt the materiality of it. It may be the company could lose a great deal of money in Carterville but that wouldn't have anything to do with unfair labor practices.

Mr. Andrews: That is what I am trying to prove, there was no unfair labor practice, they shut down because they had an inventory of 850 dozen then, when they started up they built that up to 1250 dozen.

Exam. Downing: It's pretty hard to see how starting up on May 26 you would shut down a plant abruptly on June 1st without notice, since it was on the heels of the union's request for bargaining rights.

Mr. Andrews: May I ask him, John, how much equipment were we producing a day?

Exam. Downing: We are having trouble keeping our evidence straight from the arguments, if you want to put in any more evidence, you better put on your witness, on the stand, if so, swear him and put him on the stand as a witness. [139]

JOHN TUTTLE

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Andrews): After shutting down the

(Testimony of John Tuttle.)

plant on May 11, then reopening on May 26th, what was the inventory, approximately on May 26th, when you started on May 26th, when you started production again?

A. We had completed approximately half of 850 dozen or had 400 dozen on hand, rather.

Q. What was the production per day after May 26th? A. 2500 to 3000 sprinklers a day.

Q. And on June the first, that inventory had been built up to *1205* dozen?

A. That is correct.

Q. Now, of that 1250 dozen, how much of that inventory was shipped to Portland with the equipment, machines that were shipped back there on August 3rd?

A. There were approximately 800, between 800 and 900 dozen of which there are approximately 6,500 sprinklers that haven't been sold as yet.

Mr. Andrews: That is all.

Cross Examination

Q. (By Mr. Trent): Mr. Tuttle, you stated that on May 26th there was 400 dozen on hand and May 27, you produced about 3,000 more dozen, is that right, sir? [140] A. In one day sir?

Q. What do you produce in one day, on May 27th?

A. I would give you the exact figures for May 27th, however we produced between 2500 and 3000 sprinklers a day, according to the day, how it would run.

(Testimony of John Tuttle.)

Exam. Downing: In other words, would be between 200 and 250 dozen per day. How many did you have when you shut down on May 11th?

The Witness: May 11th we had around 850 dozen, we depleted that to around 400 dozen by the 26th when we started up again, we run four days, we run Wednesday, Thursday, Friday——

Exam. Downing: You ran three days, according to you before you decided to shut down?

The Witness: We had run Wednesday, Thursday, Friday and the next Tuesday.

Exam. Downing: By that time according to you you had already decided to shut down?

The Witness: That is right. In fact, the inventory was getting large enough that Friday, was above the original inventory.

Exam. Downing: When did you actually start operating, actually start production, in April?

The Witness: I believe it was the 27th.

Exam. Downing: The 27th, and did you operate regularly from the 27th through May 11? [141]

The Witness: We started with only four or five people on the 27th——

Exam. Downing: And you operated regularly until May 11th?

The Witness: That is correct.

Exam. Downing: What happened to that notice you posted on May 11th?

The Witness: I imagine it went into the waste paper basket or any place, what you going to do save that?

(Testimony of John Tuttle.)

Exam. Downing: What happened to the one you posted on June 1st?

The Witness: Probably still on the bulletin board.

Q. (By Mr. Trent): Did that notice state any reason for the layoff at that time, on May 11th?

A. Until further notification, I believe.

Q. Did the notice on June 1st state until further notification?

A. I believe it did, I am not sure but I believe it did.

Q. You wouldn't swear to it, would you?

A. No, sir.

Q. Getting back to the May 11th notice——

A. I think these ladies back behind you can tell you more about that.

Exam. Downing: They have already testified.

Q. (By Mr. Trent): Were the employees paid in full after the May 11th notice when they were laid off?

A. I don't believe so because May 11, what day did that fall [142] on?

Exam. Downing: That is something I am very much interested in.

Mr. Tuttle: I don't believe that fell on a pay day, Mr. Trent.

Exam. Downing: While we are on the subject of pay days——

Mr. Trent: May 11th fell on a Tuesday.

Mr. Tuttle: Was it?

Exam. Downing: When was the pay day?

(Testimony of John Tuttle.)

The Witness: For the previous week?

Exam. Downing: Ending when?

The Witness: Friday.

Exam. Downing: So you paid for the work week ending on Friday?

The Witness: That is correct.

Exam. Downing: What day of the week was your pay day?

The Witness: On the following Tuesday.

Exam. Downing: Regularly?

The Witness: Yes, sir.

Exam. Downing: You paid through Friday?

The Witness: That is right.

Exam. Downing: Proceed.

Q. (By Mr. Trent): When the employees were laid off on May 11th, they were not paid off at that time, were they?

A. They were paid up until the Friday and the next Tuesday [143] they got the two days.

Q. They were paid in full after the May 11th lay off?

Exam. Downing: He just told you they weren't.

The Witness: I just told you they weren't, Mr. Trent.

Q. (By Mr. Trent): What do these days that the employees—back to the shutdown of May 11th, or rather the June 1st, shutdown, did the company ever operate any more after June 1st?

A. Yes, there was one table, I believe, we were short on 150 sprinklers.

Q. Just answer my question. A. Yes.

(Testimony of John Tuttle.)

Q. They did operate again?

A. Yes, do you want to know how much?

Exam. Downing: I'd like to know, Mr. Trent, if you are not going to ask him.

Mr. Trent: I will ask questions and if I omit anything you can ask him.

Exam. Downing: You may finish your answer.

A. (Continuing) Well, sir, we had an order came in, from the United States Government, I believe one from the government but it was a contract to the government, we were short on 100 foot sprinklers, wasn't too many.

Q. Then you did have production after June 1st?

A. On a limited scale, yes, sir.

Exam. Downing: When did you shut down completely? [144]

The Witness: Well, it was just that two days I believe and then that was all, just enough to get the order out.

Q. (By Mr. Trent): What two days were they?

A. I couldn't tell you exactly.

Exam. Downing: In June?

The Witness: Yes, it was, wait a minute, yes, it was in June, I believe.

Q. (By Mr. Trent): Did you ever have any production after the union filed the petition for the election, did you ever have any production in that plant in Carterville, Illinois, after the union filed objections to the election, which was held on June 17th, objections were filed on June 22nd, was there ever any production after that date?

(Testimony of John Tuttle.)

A. Could I ask a question to one of the ladies behind you to find out?

Exam. Downing: You will have to answer of your own knowledge.

The Witness: I don't know of my own knowledge, I could ask one of the ladies.

Exam. Downing: You will just have to answer no.

Q. (By Mr. Trent): But as far as you know there wasn't any after June 22nd?

A. I said I didn't know, I didn't say that, I don't remember whether it was before June 22nd or after June 22nd.

Q. Do you have any records there? [145]

A. Not of the last two days that we manufactured the 100 foot sprinklers, no, sir, I don't. I could probably go to the payroll records and find out.

Q. You know it was in June?

A. No, I don't, well it was in June but I don't know whether it was before June 22nd or after June 22nd.

Q. That wasn't my question, you knew it was some time in June, did you not?

A. It was either in June or some time in July.

Q. I understand your testimony of a moment ago that it was some time in June. What day did you decide to close this plant down, Mr. Tuttle?

A. What do you mean? Stop production?

Q. Stop production, major production.

A. June 1st, that is right, on June 1st.

(Testimony of John Tuttle.)

Q. And at the time that you decided to stop production you had received the union's notice that it represented the employees for bargaining rights, hadn't you? A. That morning.

Q. That afternoon you called Mr. Andrews?

A. I called him that morning.

Q. After you received notice or before?

A. Afterwards.

Mr. Trent: That is all.

Exam. Downing: Anything further? [146]

Mr. Andrews: I had one but it slipped my mind. No, sir.

Exam. Downing: That's all.

(Witness excused.) [147]

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 2-A

[Title of Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the A. M. Andrews Co. of Oregon, by A. M. Andrews, its President; the International Association of Machinists, A.F.L., by Fred Carstens, Grand Lodge Representative; and William F. Trent, Counsel for the General Counsel of the National Labor Relations Board, Fourteenth Region, St. Louis, Missouri, that the A. M. Andrews Co. of Oregon is and has been at all times material hereto a cor-

poration duly organized under and existing by virtue of the laws of the State of Oregon, with its principal office and place of business located at Portland, Oregon.

A. M. Andrews of Illinois, Inc., is a corporation duly organized and existing under and pursuant to the laws of the State of Illinois, with its principal office and place of business in Carterville, Illinois, engaged in the manufacture of plastic sprinklers. A. M. Andrews of Illinois, Inc. commenced manufacturing operations in the City of Carterville, State of Illinois, in the month of April, 1954.

The total dollar value and amount of all sales made by A. M. Andrews Co. of Oregon during the 12 month period ending June 30, 1954, is $943,000.00 more or less, and the total dollar value and amount of all sales of said corporation for the first seven months of the year 1954 was in the amount of $573,-000.00 more or less. The total dollar value and amount of all the products sold and shipped directly to points outside the State of Oregon by said corporation during the 12 month period ending June 30, 1954, amounted to $791,000.00 more or less, and the total dollar value and amount of all products sold and shipped directly to points outside the State of Oregon during the first seven months of the year 1954 amounted to in excess of $210,000.00. The total dollar value and amount of all purchases made by said corporation and shipped to the corporation from states other than the State of Oregon for the period expiring June 30, 1954, amounted to $359,000.00, more or less, and the total dollar value

and amount of all purchases shipped to said corporation from outside the State of Oregon during the first seven months of the year 1954 amounted to in excess of $120,000.00.

The names of the officers of the A. M. Andrews Co. of Oregon, the amount of their stock ownership in the corporation, and their addresses are as follows:

President: A. M. Andrews, 345 shares, 4621 Beaverton-Hillsdale Highway, Portland, Oregon.

Vice President: Alex Marshall, 16 shares, 4621 Beaverton-Hillsdale Highway, Portland, Oregon.

Treasurer: Norman Brown, 1 share, 4621 Beaverton-Hillsdale Highway, Portland, Oregon.

Secretary: Ray H. Lesher, 1 share, 4621 Beaverton-Hillsdale Highway, Portland, Oregon.

(On July 26, 1954, the resignation of Ray H. Lesher, as Secretary, was accepted. Norman H. Brown was elected to replace him.)

It is also agreed that this stipulation may be used as evidence in the hearing in the above entitled cause.

A. M. ANDREWS CO. OF OREGON
/s/ By A. M. ANDREWS, President
/s/ By NORMAN L. BROWN, Secretary
INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL,
/s/ By FRED CARSTENS,
Grand Lodge Representative
/s/ By WILLIAM F. TRENT,
Counsel for the General Counsel National Labor Relations Board

GENERAL COUNSEL'S EXHIBIT No. 2-B

[Title of Cause.]

STIPULATION

It is hereby stipulated and agreed by and between A. M. Andrews of Illinois, Inc. by A. M. Andrews, its president; the International Association of Machinists, A.F.L., by Fred Carstens, Grand Lodge Representative; and William F. Trent, Counsel for the General Counsel of the National Labor Relations Board, Fourteenth Region, St. Louis, Missouri, that A. M. Andrews of Illinois, Inc., is a corporation duly organized under and existing by virtue of the laws of the State of Illinois, with its principal office and place of business located in Carterville, Illinois. Articles of Incorporation were issued by the State of Illinois on the 23rd day of February, 1954, and said corporation actively commenced the business of manufacturing plastic sprinkling hose during the month of April, 1954.

The total dollar value and amount of all sales made by A. M. Andrews of Illinois, Inc., during the period commencing with its organization and ending with the 31st day of July, 1954 was in the amount of $26,000.00 more or less. The total dollar value and amount of all the products sold and shipped directly to points outside the State of Illinois by said corporation during the period of its active operation ending July 31, 1954 was in the amount of $22,000.00 more or less. The total dollar value and amount of all purchases made by said corporation

and shipped to the company from states other than the State of Illinois during the period of its operation was in the amount of $21,370.00 more or less.

The names of the officers of the A. M. Andrews of Illinois, Inc., and their addresses are as follows, together with their stock ownership:

President: A. M. Andrews, 1 share, 4621 Beaverton-Hillsdale Highway, Portland, Oregon.

Vice-President: John A. Tuttle, 1 share, Carbondale, Illinois.

Treasurer: Norman Brown, 1 share, 4621 Beaverton-Hillsdale Highway, Portland, Oregon.

Secretary: Ray H. Lesher, 1 share, Equitable Building, Portland, Oregon.

It is also agreed that this stipulation may be used as evidence in any hearing of the above entitled case.

A. M. ANDREWS OF ILLINOIS, INC.,

/s/ By A. M. ANDREWS, President

INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL

/s/ By FRED CARSTENS,
Grand Lodge Representative

/s/ WILLIAM F. TRENT,
Counsel for the General Counsel National Labor Relations Board

[Endorsed]: No. 14866. United States Court of Appeals for the Ninth Circuit. A. M. Andrews Company of Oregon and A. M. Andrews of Illinois, Inc., Petitioners and Respondents, vs. National Labor Relations Board, Respondent and Petitioner. Transcript of Record. Petition for Review and Petition for Enforcement of Order of The National Labor Relations Board.

Filed: October 10, 1955.

Supplemental Filed October 26, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14866

A. M. ANDREWS COMPANY OF OREGON and A. M. ANDREWS OF ILLINOIS, INC.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE OR FOR REVIEW OF A FINAL ORDER, Etc.

Petition for leave to adduce additional evidence or for review of a final order of the National Labor

Relations Board and an order that the said final order of the National Labor Relations Board be set aside.

A. M. Andrews Company of Oregon, hereinafter referred to as "Andrews Oregon," and A. M. Andrews of Illinois, Inc., hereinafter referred to as "Andrews Illinois," and collectively referred to herein as "the petitioners" petition this court for an order that additional evidence be taken before the National Labor Relations Board, herein referred to as "the Board," its members, agent or agency, and be made a part of the transcript in the proceedings entitled "A. M. Andrews Company of Oregon and A. M. Andrews of Illinois, Inc., and International Association of Machinists, A.F.L., Case No. 14-CA-1208, 112 N.L.R.B. No. 89," or for review of the decision and order in said case and an order of this court that the same be set aside.

(1) This court has jurisdiction of the subject matter of this proceeding by virtue of Section 10 (e) and (f) of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C.A. § 141, et seq., herein referred to as "the Act."

(2) The Board is an agency of the United States created by Section 3 of the National Labor Relations Act, as amended by Labor Management Relations Act, 1947, 49 Stat. 449, 29 U.S.C.A. § 151, et seq.

(3) A. M. Andrews Company of Oregon is an Oregon corporation with its principal place of busi-

ness and plant at Portland, Oregon. Its capital stock is owned 345 shares by A. M. Andrews, 16 shares by Alex Marshall, 1 share by Norman Brown and 1 share by Ray H. Lesher.

(4) A. M. Andrews of Illinois, Inc., is an Illinois corporation and from April 27, 1954, until June 1, 1954, it had its principal place of business and plant at Carterville, Illinois. Since June 1, 1954, except for three or four days, it has done no work in Carterville or elsewhere. The capital stock of Andrews Illinois consists of four shares which are owned by A. M. Andrews, John A. Tuttle, Norman Brown and Ray H. Lesher.

(5) The business of Andrews Oregon is the manufacture and sale of plastic lawn sprinklers. During the two months of 1954 that Andrews Illinois operated, it, too, manufactured and sold plastic lawn sprinklers. All of the pertinent events in this matter happened during the year 1954 and for that reason the year will be omitted.

Andrews Illinois entered Carterville as the result of negotiations between A. M. Andrews, Godfrey Hughes of Southern Illinois, Inc., and a group of Carterville industrialists, including Messrs. Hooker, Hayton and Steffes, who erected a building and rented it to Andrews Illinois.

(6) Andrews Illinois began operations on April 27, 1954, with five or six employees. On May 11 the plant was shut down and the employees were laid off with notice that the layoff was occasioned by lack of orders. Work was resumed on May 26.

(7) On May 27 the International Association of Machinists, A.F.L., herein referred to as "the Union," wrote Andrews Illinois that a majority of its employees had authorized it to represent them and requested recognition and a meeting for the purposes of negotiation.

(8) On June 1 this letter was received. Mr. Tuttle, the plant manager, called Mr. Andrews in Portland, Oregon, who directed that the plant be closed as of closing time that day. Such a notice was posted. A committee of businessmen from Carterville, including Messrs. Hughes, Hooker, Steffes and Hayton, who had arranged for the financing and construction of the plant in Carterville, arrived at the plant about 2:00 p.m. At the direction of this committee of businessmen a meeting of the employees of Andrews Illinois was held and two ballots were taken among said employees.

(9) The plant closed on June 1, 1954, and except for two or three days work to complete a government order the plant has remained closed ever since. On August 3, 1954, the inventory and machinery were shipped to Portland.

(10) The complaint alleging certain unfair labor practices was filed on June 28 by the General Counsel of the Board. On August 27 it was amended.

(11) The hearing was held in St. Louis, Missouri, on September 20 before George A. Downing, Trial Examiner. Mr. William F. Trent appeared for the General Counsel, Messrs. Fred Carstens of St.

Louis, Missouri, and Hubert Rushing of Carterville, Illinois, appeared for the Union, and Messrs. A. M. Andrews and John A. Tuttle appeared for the petitioners. Both Mr. Andrews and Mr. Tuttle are laymen.

(12) The Intermediate Report and Recommended Order of the Trial Examiner was filed on October 30, 1954. This report addressed itself to three problems: "(1) Whether respondents (the petitioners herein) are responsible for the acts and statements of the businessmen's committed (sic) on June 1; (2) Whether the shutdown was a lockout which was made to discourage Union membership; and (3) Whether respondent Oregon (herein Andrews Oregon) was a co-employer of the Carterville employees or was otherwise responsible for remedying the unfair labor practices which are found herein."

(13) The Trial Examiner found that the committee of businessmen who came to the plant on June 1 and who conducted the meeting were acting as agents for Andrews Illinois and said company was bound by their acts.

(14) The Trial Examiner likewise found that the shutdown on June 1 was made to discourage Union membership and not for economic reasons such as an inventory that was too large and losses that were mounting.

(15) The Trial Examiner found that Andrews Oregon was not a co-employer of the Carterville employees; that it had not "actively participated in the commission of the unfair labor practices" and

that it would not be held responsible for them.

(16) A request for an extension of time and a supporting affidavit were filed by counsel for petitioners and on December 9, 1954, "Exceptions of Respondents to the Intermediate Report and Recommended Order of the Trial Examiner * * *" and "Brief in Support of Exceptions * * *" were filed in which certain exceptions including the finding that the Board had jurisdiction and that an unfair labor practice had been committed and requested that the record be reopened so that further evidence as to the economic necessity for the plant closure could be taken. The additional evidence which the petitioners sought to adduce was not brought out in the original hearing because both Mr. Andrews and Mr. Tuttle were laymen and they did not understand the purpose or the scope of the hearing, and as laymen were unable to get the proper evidence pertinent to the financial condition of Andrews Illinois into the record. This evidence is material because it would show that Andrews Illinois plant was closed on June 1 because of the large inventory on hand, the huge losses sustained, and the poor demand for the product manufactured and not as an unfair labor practice.

(17) On May 10, 1955, the Decision and Order of the Board, hereinafter called the "Order" was entered, adopting the findings, conclusions or recommendations of the Trial Examiner, except that it held that Andrews Oregon was responsible for remedying the unfair labor practices in question.

(18) The Order is a final order and directly affects petitioners in that they are required to compensate certain employees of Andrews Illinois from June 1 to August 3, 1954, and more particularly it affects Andrews Oregon in requiring it to compensate said employees of Andrews Illinois for an alleged unfair labor practice with which it had no connection.

(19) The Board erred in its conclusion of law that it had jurisdiction of the matter and in its denial of petitioners' request that the record be reopened to take additional evidence.

(20) There is no substantial evidence on the record considered as a whole to support the Board's finding that there was an unfair labor practice by Andrews Illinois.

(21) There is no evidence on the record considered as a whole to support the Board's finding that Andrews Oregon and Andrews Illinois constitute a single employer and that Andrews Oregon is responsible for remedying the alleged unfair labor practices of Andrews Illinois.

(22) The Board's order that petitioners, and especially Andrews Oregon, cease and desist from the alleged unfair labor practices and that the employees of Andrews Illinois be paid from June 1 to August 3 is contrary to law, arbitrary and capricious and unsupported by substantial evidence on the record of the case considered as a whole.

Wherefore, your petitioners pray:

1. That a certified copy hereof be served upon the Board;

2. That the Board be required to certify to this court a transcript of the record of proceedings wherein the Order was entered, including the entire record before the Board in such case, together with the Intermediate Report and Recommended Order of the Trial Examiner, Request for Extension of Time to File Exceptions to Intermediate Report, Exceptions of Respondents to the Intermediate Report, Brief in support of such exceptions, and the Decision and Order of the Board in such case;

3. That this court enter an order that additional evidence be taken before the Board, its members, agent or agency, on the question of (a) whether the shutdown of Andrews Illinois was occasioned by economic necessity; and (b) the relationship of Andrews Oregon and Andrews Illinois; and (c) the nature and kind of business of said petitioners and other questions, and that the same be made a part of the transcript and record of the proceedings entitled "A. M. Andrews Company of Oregon and A. M. Andrews of Illinois, Inc., and International Association of Machinists, A.F.L., Case No. 14-CA-1208, 112 N.L.R.B. No. 89; or

4. That said proceedings, findings, conclusions and order be reviewed by this court and that said order be set aside, vacated, nullified or the Board be ordered to dismiss the complaint and the petitioners; or

5. That this court grant to petitioners such other and further relief as may be just and proper.

/s/ ALFRED A. HAMPSON, JR.,
Attorney for Petitioners

[Endorsed]: Filed September 1, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION FOR REVIEW ITS ORDER AND REQUEST FOR ENFORCEMENT OF SAID ORDER

The National Labor Relations Board by its Assistant General Counsel pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 et seq.) hereinafter called the Act, files this answer to the petition to review in the above entitled proceeding.

1. The Board admits the allegations of paragraphs 1 and 2 of the petition to review.

2. With respect to the allegations of paragraphs 3 through 22 inclusive the Board prays reference to the certified transcript of the record, filed herewith, of the proceedings heretofore had herein, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law, and order of the Board, and all other proceedings had in this matter.

3. Insofar as the petition to review incorporates a motion to adduce additional evidence, the Board prays reference to its Opposition to said motion, filed herewith.

4. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board, were and are in all respects valid and proper under the Act, and pursuant to Section 10 (c) of the Act, respectively requests this honorable Court to enforce its order issued against petitioners on May 10, 1955, in the proceedings designated on the records of the Board as Case No. 14-CA-1208 entitled "A. M. Andrews Company of Oregon and A. M. Andrews of Illinois, Inc., International Association of Machinists, AFL."

5. Pursuant to Section 10 (e) and (f) of the Act, the Board has certified and files with the Court a transcript of the entire record in the proceedings before it.

Wherefore, the Board prays that the Court enter a decree denying the petition to review and enforcing in whole said order of the Board.

Dated at Washington, D. C., this 5th day of October, 1955.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel National
Labor Relations Board

[Endorsed]: Filed October 10, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONERS INTEND TO RELY

Come now petitioners and file this, their statement of points on which they intend to rely on their petition for leave to adduce additional evidence or for review of a final order of the National Labor Relations Board, to wit:

(1) Additional evidence should be adduced pertaining to the financial condition of the petitioners because such additional evidence would be material (a) to whether the shutdown of A. M. Andrews of Illinois, Inc., on June 1, 1954, was occasioned by economic necessity; (b) to what period of time said shutdown lasted; and (c) to the nature of the relationship existing between petitioners, and such evidence was not adduced at the hearing before Trial Examiner George A. Downing on September 20, 1954, because both Mr. Andrews and Mr. Tuttle were laymen, and as such did not understand the scope of the hearing nor were they able to get such evidence into the record.

(2) The National Labor Relations Board erred in that there is no evidence on the record as a whole to support its finding (a) that A. M. Andrews Company of Oregon, and A. M. Andrews of Illinois, Inc., constitute a single employer; (b) that A. M. Andrews Company of Oregon was responsible for the alleged unfair labor practice of A. M. Andrews of Illinois, Inc.; (c) that the employees of A. M.

Andrews of Illinois, Inc., be paid from June 1 to August 3, 1954; and (d) that the employees of A. M. Andrews of Illinois, Inc., be paid by A. M. Andrews Company of Oregon.

Submitted this 11th day of November, 1955.

/s/ RALPH R. BAILEY
/s/ ALFRED A. HAMPSON, JR.

[Endorsed]: Filed November 14, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD ON PETITION FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE OR FOR REVIEW OF FINAL ORDER

Come now petitioners and designate the following portion of the record and proceedings herein to be contained in the record on their petition for leave to adduce additional evidence or on review of the final order of the National Labor Relations Board, to wit:

(1) Trial Examiner Downing's Intermediate Report and Recommended Order, dated October 28, 1954; Order Transferring case to the Board, dated October 28, 1954, together with affidavit of service and United States post office return receipts thereof.

(2) Petitioners' Request for Extension of Time to File Exceptions to Intermediate Report and

Recommended Order of Trial Examiner and Brief in Support of Said Exceptions.

(3) Petitioners' Exceptions to the Intermediate Report and Recommended Order, including the request that the record be reopened, received December 6, 1954.

(4) Decision and Order issued by the National Labor Relations Board on March 10, 1955, together with affidavit of service and United States post office return receipts thereof.

(5) Page 25, line 2, through page 27, line 5; page 102, line 2, through page 113, line 20; page 125, line 14, through page 147, line 3, of stenographic transcript of testimony taken before Trial Examiner George A. Downing on September 20, 1954.

(6) Exhibit No. 2 and Exhibit No. 2-B introduced in evidence before the Trial Examiner George A. Downing on September 20, 1954.

(7) Petitioners' Petition for Leave to Adduce Additional Evidence or for Review of a Final Order of the National Labor Relations Board, and an order that the said final order of the National Labor Relations Board be set aside, filed August 30, 1955.

(8) Statement of Points on Which Petitioners Intend to Rely.

(9) This designation of record.

Respectfully submitted,

/s/ RALPH R. BAILEY,
/s/ ALFRED A. HAMPSON, JR.

[Endorsed]: Filed November 14, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the findings of fact recited in Sections I through III B-1 of the Intermediate Report in this case are supported by substantial evidence on the record as a whole, save and except the date of August 3, being the date of final shutdown of the Carterville plant, as the same appears on page 2, line 32, and page 4, line 35, of said Intermediate Report, and that the Court should accept such findings of fact, although the evidence in support thereof will not be printed in the record.

Dated at Portland, Oregon, this 13th day of December, 1955.

/s/ MAGUIRE, SHIELDS, MORRISON & BAILEY,
Attorneys for Petitioners

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel National Labor Relations Board

[Endorsed]: Filed December 23, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH RESPONDENT INTENDS TO RELY

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, respondent, in conformity with the rules of this Court, hereby states the following points on which it intends to rely:

1. The Board properly found that A. M. Andrews Company of Oregon and A. M. Andrews of Illinois, Inc., petitioners, were a single "employer" within the meaning of the Act.

2. Substantial evidence supports the Board's finding that petitioners interfered with, coerced and restrained their employees in violation of Section 8 (a) (1) of the Act.

3. Substantial evidence on the record considered as a whole supports the Board's finding that petitioners discriminatorily closed down their Illinois plant in violation of Section 8 (a) (3) and (1) of the Act.

4. The Board's order is valid and proper.

Dated at Washington, D. C., this 21st day of December, 1955.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel National
Labor Relations Board

Certificate of Service attached.

[Endorsed]: Filed December 27, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

COUNTERDESIGNATION OF RECORD TO BE PRINTED

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the National Labor Relations Board, respondent, and designates the following portion of the record to be printed in accordance with the rules of this Court:

The stipulation as to facts not contested, dated December 13, 1955.

Dated at Washington, D. C., this 22nd day of December, 1955.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board

[Endorsed]: Filed December 27, 1955. Paul P. O'Brien, Clerk.

United States
Court of Appeals
For the Ninth Circuit

A. M. ANDREWS COMPANY OF OREGON, et al.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Brief for Petitioners

Petition for leave to adduce additional evidence or for review of a final order of the National Labor Relations Board and an order that the said order of the National Labor Relations Board be set aside.

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HOUGHTON CARSON COMPANY, PRINTERS

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

Brief for Petitioners

Petition for leave to adduce additional evidence or for review of a final order of the National Labor Relations Board and an order that the said order of the National Labor Relations Board be set aside.

Jurisdiction

This is a petition by A. M. Andrews Company of Oregon, hereinafter referred to as "Andrews Oregon", and A. M. Andrews of Illinois, Inc., hereinafter referred to as "Andrews Illinois", and referred to herein as "petitioners", to this Court for an order that additional evidence be taken before the National Labor Relations Board, herein referred to as "the Board", its members, agent or agency and be made

part of the transcript in the proceedings entitled "A. M. Andrews Company of Oregon and A. M. Andrews of Illinois, Inc., and International Association of Machinists, A.F.L., Case No. 14-CA-1208, 112 N. L. R. B. No. 89" or for review of the Decision and Order in said case and for an order of this Court that the same be set aside.

This Court has jurisdiction of the subject matter of this proceeding by virtue of Section 10(e) and (f) of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C.A. §141, et seq.

STATEMENT OF THE CASE

The Facts

A. M. Andrews Company of Oregon is an Oregon corporation with its principal place of business in Portland, Oregon. Its stock is owned as follows: A. M. Andrews 345 shares, Alex Marshall 16 shares, Norman Brown 1 share and Ray H. Lesher, 1 share. Its officers are as follows: Andrews, president; Marshall, vice president; Brown, treasurer, and Lesher, secretary. Mr. Lesher resigned as secretary on July 26, 1954, and was succeeded by Mr. Brown.

Andrews Oregon began to manufacture plastic hose sprinklers in 1951. It is still in that business.

A. M. Andrews of Illinois, Inc., is an Illinois corporation with its principal place of business in Carterville, Illinois. Its stock is owned as follows: A. M. Andrews 1 share, John A. Tuttle 1 share, Nor-

man Brown 1 share and Ray H. Lesher 1 share. Its officers are: A. M. Andrews, president; Tuttle, vice president; Brown, treasurer, and Lesher, secretary (R. 3).

Andrews Illinois was organized on February 27, 1954. It began to manufacture plastic hose sprinklers on April 27. Between May 11th and May 26th it was shut down for lack of orders. On June 1 it shut down and except for a few days' work for a few employees in July it has not operated since either there or elsewhere.

Separate bookkeepers were employed. Separate books for each company were maintained (R. 4).

Andrews Illinois entered Carterville, Illinois, as the result of negotiations between Mr. A. M. Andrews and Godfrey Hughes of Southern Illinois, Inc., which organization is interested in the industrial development of Southern Illinois. There were also negotiations with a group of Carterville businessmen including Lee Hooker, Mack Steffes, Paul Dorcy and Wes Hayton. These men erected the plant which Andrews Illinois occupied and contracted to purchase (R. 5).

Two men from Portland came to Carterville to help set up the plant and train the personnel (R. 3) and stayed on as plant manager and production foreman (R. 4).

The plant operated from April 27 to May 11, when it shut down for lack of orders. It again began production on May 26 and operated until June 1.

The Union began an organizing campaign during the lay-off and sent a letter to Andrews Illinois requesting recognition and a meeting for negotiation. This letter was received on June 1.

Mr. Tuttle, the manager of Andrews Illinois, telephoned Mr. Andrews in Portland, who directed that the plant be closed. About 2 p.m. a committee of Carterville businessmen consisting of Hughes, Hooker, Steffes, Hayton and Heckle came to the plant, called a meeting of the employees during working hours, addressed them on the subject of the Union and its request to bargain. Two ballots of the workers were taken.

The plant was closed at the end of the work day and has remained closed ever since, except a few days' work to fill out a government order.

As a result of the activity on June 1, a proceeding under Section 10(b) of the National Labor Relations Act as amended was brought. The complaint was issued on June 28 and amended on August 27 and the hearing was held on September 20.

The Intermediate Report and Recommended Order of the Trial Examiner was entered on October 28, 1954. The Trial Examiner found that Andrews Illinois was guilty of certain unfair labor practices and that it was responsible for the acts and statements of the Carterville businessmen.

The Trial Examiner found that Andrews Oregon did not engage in the unfair labor practices of An-

drews Illniois and could not be held responsible for them.

The Decision and Order of the Board which was rendered May 10, 1955, affirmed the findings of the Trial Examiner except that it held that Andrews Oregon was responsible for the unfair labor practices of Andrews Illinois.

The Issues

The issues before this Court are two in number:

(1) Whether the Board erred in finding that Andrews Oregon was responsible for the unfair labor practices of Andrews Illinois and that the employees of the said Andrews Illinois be paid by Andrews Oregon because there is no evidence in the record as a whole to support such finding.

If the Court finds that the Board erred, then the Court does not have to answer the second issue, which is:

(2) Whether the Board should be ordered to take additional evidence as to the economic causes of the shut-down of Andrews Illinois, the date of such shut-down and the relationship between Andrews Oregon and Andrews Illinois.

The question before this Court is not whether there was an unfair labor practice. That is conceded. The question is whether there was evidence in the record as a whole to support the Decision and Order of the Board that Andrews Oregon should be held responsible for the unfair labor practice.

The Trial Examiner in his Intermediate Report and Recommended Order held that Andrews Oregon did not commit the unfair labor practice and could not be held responsible for the unfair labor practices of Andrews Illinois. That portion of his report dealing with the responsibility of Andrews Oregon is set forth in Appendix A to this brief.

On the responsibility of Andrews Oregon, the Board reversed the Trial Examiner and held Andrews Oregon responsible. That portion of the Decision and Order of the Board dealing with the responsibility of Andrews Oregon is set forth in Appendix B.

I.

THERE WAS NO EVIDENCE TO SUPPORT THE BOARD'S FINDING IN HOLDING ANDREWS OREGON RESPONSIBLE.

Summary of Argument

(1) Andrews Oregon and Andrews Illinois were two separate and distinct corporations.

(2) Andrews Oregon did not commit nor have anything to do with Andrews Illinois' unfair labor practice.

(3) The seven factors of "paramount significance" have no basis either in law or in fact to support the Board's holding that Andrews Oregon be held liable to the employees of Andrews Illinois.

Argument

The Board, in reversing the Trial Examiner, is flying in the face of both common sense and established law. A reading of the appendices to this brief will establish that. The reason why the Board undertook to reverse the Trial Examiner is obvious. Andrews Illinois is defunct. After it closed down on June 1 it never again reopened. An order directing that the unfair labor practice be remedied and that the Andrews Illinois employees be given pay following the unfair labor practice would be meaningless. This being so, the Board decided to stick Andrews Oregon.

However, there is no evidence to support its finding that Andrews Oregon was an employer, within the meaning of the Act, of the employees of Andrews Illinois.

The very reason which motivated the Board to hold Andrews Oregon liable is ample evidence that it should not be held liable. Andrews Oregon is still in business—Andrews Illinois is defunct. An examination of the record will point out the differences between the two corporations.

Andrews Oregon was an Oregon corporation manufacturing plastic sprinkler hose in Portland, Oregon. It was founded in 1951. Mr. Andrews owned 345 shares (R. 3) or about 80 per cent (R. 65).

Andrews Illinois was an Illinois corporation organized in February, 1954. It manufactured plastic

hose sprinklers in Carterville, Illinois. Mr. Andrews owned only 25 per cent of the stock (R. 3). Each company had its own set of books and its own bookkeepers (R. 4). While the officers were substantially the same, there were differences.

There can be no doubt that there were two separate corporations—one an Oregon corporation—one an Illinois corporation. Likewise, there cannot be any doubt that, while three individuals owned stock in each company, Alex Marshall owned 16 shares of stock in Andrews Oregon and none in Andrews Illinois. John Tuttle owned none in Andrews Oregon and one-quarter of the stock of Andrews Illinois. As to the three stockholders common to each company, it has been pointed out that Mr. Andrews owned the vast majority of the stock of Andrews Oregon and that he owned but one-quarter of the Illinois corporation. The reverse is also true. Both Norman Brown and Ray H. Lesher owned one share of the Oregon company—a very small percentage—but each owned a quarter of the stock of Andrews Illinois.

The unfair labor practice of which Andrews Illinois was found guilty was based to a very large extent upon the holding that certain Carterville businessmen were the agents of the Illinois corporation when they appeared at the plant and attempted to influence the employees of Andrews Illinois against the Union. The creation of this agency relationship between Andrews Illinois on the one hand

and the Carterville businessmen on the other seems to stretch the common law concepts of agency pretty far, but to create the relationship of principal and agent between these Carterville merchants on the one hand and Andrews Oregon on the others is preposterous. There is no evidence that these men ever acted for or in behalf of the Oregon corporation. It is to be noted that the Trial Examiner found that Andrews Oregon "was not responsible for any of the unfair labor practices which were committed at Carterville" (R. 14).

The evidence and the finding of the Trial Examiner (R. 14, 114) clearly show that Andrews Oregon had nothing to do with unfair labor practice (b)—that is the polling and questioning of the Carterville employees concerning their union activities, sympathies, etc.

By the very same token, Andrews Oregon could have nothing to do with the lockout. There is no doubt that such a lockout was ordered, that such a lockout was an unfair labor practice, and that such a lockout was ordered by Mr. Andrews. There is a complete failure of evidence that A. M. Andrews Company of Oregon, the corporation, had anything to do with it (R. 14).

In *N. L. R. B. v. Bonita Fruit Co., Inc.,* 158 F. (2d) 758 (5th Cir., 1947), the Court passed upon a similar problem. The stock of Vahlsing, Inc., was owned by the same persons and in the same proportions as the stock of the Bonita Fruit Co., Inc. In this case

neither the directors nor the officers were the same. The unfair labor practice was committed by an agent of Vahlsing, Inc., and in ruling on the question as to whether Bonita should be held liable for such unfair practice the Court said on page 759:

> "* * * The Board declined to find that the organization of Bonita was a mere trick to evade the law. It was a substantial corporation lawfully organized with different and independent officers, plant and business, and with its own assets and liabilities. That it was owned by the same stockholders as Vahlsing, Inc., does not make them identical legal persons in labor law any more than in other law. Vahlsing, Inc., is not responsible for the discrimination in October, 1944; nor can it reinstate the 14 employees; or be called on to make them whole. The joint order is not enforciable against it."

The Board undertook to overrule the Trial Examiner on the question of the responsibility of Andrews Oregon (R. 51-52 and Appendix B of this brief). In support of its ruling, the Board has enumerated seven factors of "paramount significance" to which "the Trial Examiner did not avert" (R. 52).

They are as follows:

(1) "That both Respondents are engaged in manufacturing and selling the same product and have almost identical names."

That these factors are true is not in issue. What possible significance could they have? To ask this question is to answer it. Can A. M. Andrews Com-

pany of Oregon (an Oregon corporation) be held responsible for the acts of A. M. Andrews of Illinois, Inc. (an Illinois corporation), because of the similarity of name and product?

Mount Hope Finishing Co. v. N. L. R. B., 211 F. (2d) 365 (4th Cir., 1954), is a case virtually identical on its facts and one whose logic and holding should control here. In that case, upon petition to review, the Court refused to enforce an order of the Board holding a North Carolina corporation responsible for certain acts of a Massachusetts corporation. There both corporations were in the business of finishing textiles. The North Carolina corporation was created as the Creedmore Company but its name was changed to Mount Hope Finishing Company, Inc.—a name identical with the Massachusetts corporation.

The similarity of names came before the Court in *N. L. R. B. v. Red Rock Co.,* 187 F (2d) 76 (5th Cir., 1951). One company was named Red Rock Cola Company. The other was the Red Rock Company. Both were Georgia corporations. That fact was given no weight in the opinion of the Court.

Nothing could be of less significance as to the true character and identity of a corporation than its formal corporate name. The lack of similarity of names in *Somerset Classics, Inc.,* 90 N. L. R. B. 1676, was given no weight there. It is inconceivable that the similarity of name should be given any weight here (cf. *N. L. R. B. v. Lunder Shoe Corp.,* 211 F. (2d)

284 (1 Cir., 1954), Lunder Shoe Corp., dba Bruce Shoe Co. and Bruce Shoe Co., Inc.).

The fact that Andrews Illinois and Andrews Oregon manufactured and sold the same product is likewise of no significance. In the Mount Hope case, both companies finished textiles. In the Bonita case, both companies handled citrus fruit.

(2) "That A. M. Andrews is the virtual owner of Respondent Oregon, and together with his nephew owns 50 per cent of the stock of Respondent Illinois."

Mr. Andrews owned approximately 80 per cent of the stock of Andrews Oregon but he owned only 25 per cent of Andrews Illinois. That his nephew, Mr. Tuttle, also owned 25 per cent of the Illinois company is of little evidentiary value. Even if Mr. Andrews and Mr. Tuttle could be counted as one, and there is no evidence of this except that Mr. Tuttle happens to be Mr. Andrews' nephew, they still do not control the Illinois corporation. It is to be noted that Tuttle, who owns one-quarter of the stock of the Illinois corporation, is not a stockholder of the Oregon corporation. It is also to be noted that Alex Marshall, who is the second largest stockholders of Andrews Oregon, owns no stock in Andrews Illinois.

In the Mount Hope case, Robert D. Milliken owned 60 per cent of the Massachusetts Mount Hope corporation and 100 per cent of the North Carolina Mount Hope corporation. In the Bonita Fruit case, the stock of Vahlsing, Inc., was owned by two people.

The same two people formed the Bonita Fruit Company and held stock in the same proportion. In *N. L. R. B. v. Shawnee Milling Co.*, 184 F. (2d) 57 (10 Cir., 1950), the Pauls Valley Company was a branch plant of the Shawnee Company. The Court held that such a fact was not controlling. The language which the Court used, while on a different facet of the problem of related companies, is of value here. On page 59 the Court said:

> "* * * To hold that under these conditions the common ownership of the two plants subjects Pauls Valley, a purely intrastate operation, to the jurisdiction of the Board would be to hold that one may not operate two businesses, wholly separate and apart—one engaged in interstate business and the other in intrastate operations—without subjecting both to the jurisdiction of the Board. We know of no case that has gone that far."

(3) "The officers in both corporations are virtually the same."

Mr. Andrews was the president and Mr. Brown the treasurer of each corporation. Mr. Marshall, the vice president of Andrews Oregon, held no position with Andrews Illinois. Mr. Tuttle was the vice president of Andrews Illinois but was not an officer of the Oregon corporation. He was also the general manager of the Carterville plant (R. 66). Up until July 26, 1954, Mr. Lesher was the secretary of each company. On that day he resigned as secretary of the Oregon company, but retained that position with

Andrews Illinois. While this change of management took place after the unfair labor practice, it is none the less indicative of the separateness of the two corporations.

Again, referring to the Mount Hope case, the officers of both corporations were identical but that fact was held to be of no consequence.

(See Appendix C.)

(4) "That the Respondent Oregon lent its credit to Respondent Illinois in the acquisition by the latter of raw materials and machinery—thereby providing the very means whereby the Respondent Illinois could operate."

(5) "That after the shut-down of the Carterville plant, the raw materials and physical assets of Respondent Illinois were turned over to Respondent Oregon, presumably to be disposed of as the latter might direct."

These two items may be treated together. There is no doubt that Andrews Oregon guaranteed that the suppliers of Andrews Illinois would be paid. The guaranteeing that the suppliers of a new corporation will be paid is a phenomena of business that occurs daily. Often the officers of a corporation go on the note of a corporation in their individual capacity. Countless times every day a promissory note has an accommodation endorser on it. None of these purely financial transactions would make the person primarily liable and the one guaranteeing the same with respect to their respective obligations to their employees.

In every commercial venture there are countless examples of the extension of credit—and the guaranteeing by Andrews Oregon was merely an extension of credit to Andrews Illinois. To do so is certainly not an act that would make the lender an employer under the Act.

In this case the Carterville businessmen—those same men who were held to be the agents of Andrews Illinois in the commission of the unfair labor practice—extended credit to the Illinois corporation. They built the Carterville plant and then entered into a contract to sell it to Andrews Illinois (R. 5). This extension of credit, like any bank loan, like the guaranteeing by Andrews Oregon, has no bearing on whether anyone other than Andrews Illinois should be responsible for the consequences of its unfair labor practices.

Just as the giving of credit by one corporation or individual to another is an ordinary everyday commercial happening, so is the taking of security for such a guarantee. After Andrews Illinois closed down its plant at Carterville, it was never reopened. Mr. Andrews attempted to explain the financial trouble of Andrews Illinois and in fact the Board found that the Illinois corporation closed its plant as the result of economic considerations (R. 54). What other course was left open to Andrews Oregon than to do exactly what it did? Certainly it could not leave the raw materials and machinery at the Carterville plant. They had to be removed and so

quite naturally they were taken to Portland so that Andrews Oregon could look to them for security for its guarantees.

In fact, the very manner in which this transaction was handled discloses that these were two separate and distinct companies. The Board finds that the "Raw materials used by the Carterville plant was (sic) carried on the books of Respondent Oregon corporation as an account receivable." It was handled like any other sale on credit—and when the purchaser could not pay, the goods were reclaimed.

In the Mount Hope case exactly the same financial transactions took place, except that the North Carolina company prospered. On page 372, the Court said:

> "In order to reach the conclusion that the business was removed from Massachusetts to North Carolina, it was necessary to hold, and the Board found, that the North Carolina corporation is the *alter ego* of the Massachusetts corporation. In support of this proposition the Board points out amongst other things that Robert D. Milliken owns 60% of the Massachusetts corporation and 100% of the North Carolina corporation; that the two companies have the same officers and the same name and *that 80% of the machinery worth $100,000 and supplies worth $750,000 were sent from Massachusetts to North Carolina and are carried on the books of the North Carolina corporation on open account as purchases yet unpaid for.* These, of course, are significant circumstances; but the fact remains that

the North Carolina business belongs in its entirety of Robert D. Milliken while Daylor owns 36% of the Massachusetts corporation for which he paid $400,000. According to the uncontradicted testimony he has no financial interest in the North Carolina corporation and expects it to fulfill its obligations. Under these circumstances we cannot say that the two corporations are one and the same enterprise. The Massachusetts corporation is now in process of liquidation and so far as can be foreseen, its active life is at an end. The North Carolina corporation is carrying on an active business enterprise. The only reasonable conclusion to be drawn from these facts is that the business of one corporation is at an end and that the business of the new and living corporation is separate and distinct. Aside, however, from this viewpoint it is manifest and we hold that the change from Massachusetts to North Carolina was made for economic reasons and not to avoid bargaining with the union." (emphasis added)

(6) "That the labor relations of both corporations were controlled by the same person, the aforementioned A. M. Andrews."

This finding by the Board is not supported by the record.

Mr. Andrews testified as follows (R. 66):

"Q. Who is your managing agent, who was at the time of the shut-down at the plant at Carterville, Illinois?

"A. John Tuttle.

"Q. To whom did Mr. Tuttle report?

"A. To the Board of Directors.

"Q. Who does he report directly to, does he report directly to you as President?

"A. Yes.

"Q. Who handles the labor relations problems, if any, at your Oregon establishment?

"A. We don't have any.

"Q. If you had any, who would handle them, Mr. Andrews, if you had any?

"A. Well, I don't know about something that we never had. We never had to hire anyone for that reason.

"Q. You do consider yourself as the man who would handle any labor relation problems at both establishments, do you not?

"A. Well, naturally, to go along with the policy I have followed."

How can the Board say that Mr. Andrews controls the labor problems of Andrews Oregon when he himself says that there have never been any and that he cannot say about something that has never happened?

There is no question that Mr. Andrews was the president of each corporation, but that fact certainly does not make Andrews Oregon liable for the unfair labor practices which Mr. Andrews may commit in

his capacity as the head of Andrews Illinois. As president of Andrews Oregon he is responsible to one group of stockholders and as president of Andrews Illinois he is responsible to a different group.

(7) "That A. M. Andrews demonstrated his practical control over Respondent Illinois by himself making the vital decision to shut down operations at Carterville."

Other than the fact that this statement is not supported by the record (R. 67), it has no weight at all in supporting the Board's conclusion to make Andrews Oregon responsible to pay the employees of Andrews Illinois. That Mr. Andrews ordered the shut-down is not in issue, nor is in issue the fact that such order was an unfair labor practice. That order was made, as we have said in the last point, by Mr. Andrews in his capacity as president of the Illinois corporation. There is nothing to tie such action up with Andrews Oregon.

The Board has laboriously recited seven separate points which it states the Trial Examiner overlooked (R. 52). The Board unfortunately overlooks the one point which must be necessary to hold these two corporations "a single employer within the meaning of the Act." There is no evidence which shows that the corporations are "interrelated or intertwined" or that Andrews Illinois is part of "a single enterprise".

The Board in *Don Juan Co., Inc., and Don Juan, Inc.*, 79 N. L. R. B. 154, 178 F. (2d) 625 (2 Cir., 1949),

held that the two companies were interrelated and intertwined and a single employer. There Don Juan Co. was manufacturing and selling cosmetics. This business Don Juan, Inc., used to do. The manufacturing was done in a building owned by Don Juan, Inc. Don Juan Co. was not only owned largely by the same two individuals who owned Don Juan, Inc., but also Don Juan, Inc., held stock in the Don Juan Co. The identity of these two corporations, the fact that one was an operating company and the other a holding company, their close physical proximity are a far cry from the fact situation as it applies to petitioners. Both of petitioners are independent. While there are stockholders in common, it cannot be compared to the Don Juan situation.

In the case now before the Court, one company operates in Portland and the other operated in Carterville.

In *Somerset Classics, Inc.,* 90 N. L. R. B. 1676, Modern was a clothes jobber which bought material and cut it. Other firms completed the garments and then sold the completed garments back to Modern, which then in turn sold them. Somerset was engaged exclusively in processing Modern's fabrics. The ownership of both Modern and Somerset was by the Friedman family. The labor relations were carried on by the same man and his decision "as an officer of Modern to cease using Somerset as a contractor made Modern the means for accomplishing the anti-union policies of Somerset." This case may be easily

distinguished from the one now before the Court. First, neither Andrews Illinois nor Andrews Oregon played any part in the manufacture of the other's finished product. Each company made its own sprinkler hose. Neither is part of a single enterprise. Second, the decision of Mr. A. M. Andrews to close down the plant of Andrews Illinois was made in his capacity as president of that company. It had no effect on Andrews Oregon or its employees who were completely separate, being some 2,000 miles away, and operating under different conditions and circumstances. Nor can it be argued with any logic or persuasion that Mr. Andrews' decision was made in his capacity as president of Andrews Oregon. Andrews Oregon, other than lending its credit, had nothing to do with Andrews Illinois. No anti-union policy of Andrews Oregon, even if it had one, could be furthered by that decision of Mr. Andrews acting as president of Andrews Oregon.

The decision had to be made in his capacity as president of Andrews Illinois and as such it had nothing to do with Andrews Oregon.

In *N. L. R. B. v. Federal Engineering Co.*, 153 F. (2d) 233 (6 Cir., 1946), the Court on page 234 found:

> "* * * the corporation and the co-partnership are engaged in a single enterprise conducted by the same four individuals. Their actions as partners and as owners, directors and officers of the corporation in controlling the labor policies of the co-partnership and committing the unfair labor practices found cannot be separated sen-

> sibly. The corporation *owns the plant and fixtures* and its affairs are so interrelated and intertwined with those of the co-partnership as to make it an essential party * * *" (emphasis added).

Andrews Oregon did not own the plant of Andrews Illinois. Other than its loan of credit, the companies, for the purposes of this unfair labor practice, as well as most other purposes, were complete strangers.

N. L. R. B. v. Condenser Corp., 128 F. (2d) 67 (3 Cir., 1942), does not apply here. There the Condenser Corporation did the manufacturing after purchasing the materials at cost from the Cornell corporation. After the product was manufactured it was sold back to Cornell at Condenser's cost. The companies became affiliated and Condenser subsequently became a wholly owned subsidiary of Cornell.

There can be no doubt that the record taken as a whole does not support the finding of the Board that Andrews Oregon and Andrews Illinois are a single employer. The facts do not support such a finding nor does the law as set forth in *Mount Hope Finishing v. N. L. R. B.*, supra.

II.

THE PETITION THAT THE MATTER BE REOPENED AND ADDITIONAL EVIDENCE BE ADDUCED SHOULD BE GRANTED.

Summary of Argument

(1) The financial evidence as to the economic condition of Andrews Illinois is relevant.

(2) The Board is in error that the closing date of the Carterville plant was August 3.

(3) Additional evidence would show more clearly that Andrews Oregon and Andrews Illinois are separate companies.

Argument

If this Court does not find that Andrews Oregon is not an employer within the meaning of the Act, it should then grant the petition that the matter be reopened and additional evidence be adduced.

This petition for leave to adduce additional evidence will be met and opposed on three grounds. Let us face those grounds candidly and realistically at this time. They are: (1) That Mr. Andrews has had his day in court and there should be an end of litigation; (2) that although Mr. Andrews was a layman he had ample opportunity to employ lawyers to aid him in the hearing; and (3) that the evidence which petitioners now seek to adduce is not newly discovered.

In each case these grounds of opposition are true to a varying degree. But, even with that being true,

petitioners are of the opinion that the record should be reopened and additional evidence adduced.

A reading of the record and especially that portion which sets forth the transcript of Mr. Andrews' testimony (R. 62 to 96) will show that Mr. Andrews was attempting to get before the Trial Examiner the facts and figures and the production of Andrews Illinois so that he could explain why the order to close the Carterville plant of Andrews Illinois was given. If the order were given for economic consideration, that is because the plant was losing money, and not to avoid the duty to bargain collectively with one's employees, then in that case the action of Andrews Illinois would not be an unfair labor practice. As the record now stands, there is ample evidence to support the finding of the Trial Examiner and of the Board that Andrews Illinois committed an unfair labor practice. However, if the record were reopened and testimony were taken which would show the condition of Andrews Illinois, this would have bearing upon whether the order to shut down was in fact an unfair labor practice.

As has been previously stated, the Trial Examiner found that Andrews Illinois committed unfair labor practices by polling its employees (this being done by the committee of businessmen from Carterville) and by locking out the employees on June 1. Certainly the taking of additional evidence bearing upon the economic condition of Andrews Illinois would have no bearing upon the unfair labor prac-

tice which resulted from the activity of the Carterville merchants in their capacity as pseudo agents. But, it would have great probative value as to whether the order of Mr. Andrews in his capacity as president of Andrews Illinois was motivated by a desire to refuse to bargain with the union or by a desire to lessen the losses of Andrews Illinois.

The Board stated that it would not deem such financial evidence of sufficient probative value to justify the shut-down of the Carterville plant of Andrews Illinois for economic reasons (R. 49). Certainly such evidence has a bearing upon the problem and in such a hearing as this all of the facts should come before the Trial Examiner and before the Board as a whole in order that a just result may be had.

Petitioners likewise come before the court requesting that additional evidence be adduced bearing on the length of the period of the shut-down (R. 111). In both the Intermediate Report and Recommended Order of the Trial Examiner and the Decision and Order of the Board, there has been the assumption that the discriminatory lockout and unfair labor practice of Andrews Illinois lasted from June 1 until August 3. Apparently the August 3 date was established by the testimony of Mr. Andrews (R. 72), which reads as follows:

> "Exam. Downing: When did the plant finally close, Mr. Andrews? [109]
>
> "The Witness: Can't give you that.

"Mr. Tuttle: Third of August.

"The Witness: Third of August."

The August 3 date to which Mr. Andrews referred was supplied by Mr. Tuttle, who at that time was not under oath. A reading of the testimony of Mr. Andrews will disclose that the plant was shut down from June 1 on, except for a few days when a small number of employees filled out a government order. The August 3 date was the date when the machinery was dismantled and moved out of the plant.

Additional evidence of a financial nature would bear upon this point and it would be of great importance to petitioners because it would tend to dispel from the mind of the Board an incorrect assumption that the plant was discriminatorily shut down from June 1 to August 3. In fact, the plant was shut down and never reopened.

To be sure, the Board has handled this matter in a rather cavalier manner by its footnote on page 49 of the Record where it states that any determination as to what might have been done between June 1 and August 3 "may properly be raised in the compliance stage of this proceeding." This footnote by its very nature discloses the misapprehensions under which the Board was laboring. Additional evidence would do much to clear up this point.

The Board has made much of the fact that Andrews Oregon guaranteed that the suppliers of Andrews Illinois would be paid. It has made much of

the way in which these accounts were carried on the books of the Oregon corporation. The supplying of credit by the Oregon corporation to the Illinois corporation is one of the items about which Mr. Andrews endeavored to testify, but, because of the fact that he was a layman, he was unable to get the matter before the Trial Examiner and into the record.

The Trial Examiner, after having had an opportunity to view the witnesses personally, found that Andrews Oregon did not commit an unfair labor practice and should not be held liable to the employees of Andrews Illinois. The Board, on reviewing a confused and cold record, undertook to hold Andrews Oregon liable for the unfair labor practice of the Illinois corporation. There is not enough evidence in the record to support the finding of the Board that Andrews Oregon and Andrews Illinois should be considered a single employer, but if the Court were to so find, the record should be reopened so that additional evidence showing the true nature of the relationship between these two corporations may be adduced.

A reading of the testimony of Mr. Andrews will show that he did not understand the nature of the labor hearing. This Court is now faced with the question as to whether Andrews Oregon and its stockholders should be permanently prejudiced by the fact that Mr. Andrews was unable to understand or cope with the situation which existed at the hearing.

CONCLUSION

The Trial Examiner found that Andrews Illinois had committed two unfair labor practices: (a) by attempting to influence the workers by the intervention of a committee of businessmen, and (b) by a discriminatory lockout ordered by Mr. Andrews. The Trial Examiner found that Andrews Oregon had nothing to do with the commission of these unfair labor practices and could not be held liable for paying the employees of the Illinois corporation.

The Board, in its Decision and Order, saw fit to overrule the Trial Examiner and to hold Andrews Oregon liable as an employer of the Carterville workers.

There is no evidence in the record to support this finding. There is no evidence that shows that Andrews Oregon had anything to do with the representations of the Carterville businessmen. Nor is there any evidence that shows that Mr. Andrews' order to shut down the plant, which was given on June 1, was given by him in any other capacity than as president of Andrews Illinois.

The Board, in its Decision and Order, has set forth a certain number of grounds upon which it has attempted to justify its finding that Andrews Oregon should be liable. These grounds uniformally are unsupported by the evidence of the record taken as a whole and even if they were supported they are without legal effect. At most they can be called

"window dressing" but unfortunately it is merely dressing without a window. There is no showing of interrelationship between these companies or the fact that one is merely a part and parcel of the other. Therefore, this Court should set aside the final order of the National Labor Relations Board.

Or failing to do that, should permit the record to be reopened and additional evidence adduced.

Respectfully submitted,

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Alfred A. Hampson, Jr.,

Attorneys for Petitioners.

Thus the evidence shows that the two companies were separate corporate entities, which separately owned and operated plants in widely separate localities, which employed separate sets of production employees, and which kept separate books and records. Though Andrews, individually, owned the controlling stock interest in the Oregon company, he did not do so in Illinois. In the latter corporation, for example, Tuttle, Brown, and Lesher were obviously in position to outvote Andrews in all stockholders' meetings, since together they owned 75 per cent of the corporate stock. Cf. Mt. Hope case, supra, at p. 372. Significant also as indicative of separate entities was the fact that though Lesher resigned as secretary of Oregon on July 26, he did not resign his corresponding position in Illinois. Of further significance, particularly in assessing Oregon's responsibility for commission of the unfair labor practices, is the fact that Tuttle, under whose immediate management the Carterville plant was operated, was neither a stockholder nor an officer of the Oregon company.

The evidence also fails to show that common employment conditions existed in the separate plants which the respective Respondents operated, that their operations were integrated, that they had offices at the same address, or that they maintained a common bank account. Cf. Inter-Ocean Steamship Co., 107 NLRB No. 92. This is not a case of a single,

or integrated, enterprise, parcelled into production and distribution, or into other convenient segments, by the corporate arrangements of the Respondents themselves. Cf. N.L.R.B. vs. Concrete Haulers, Inc., 212 F. 2d 477, 479 (CA 5), decided May 6, 1954. The case is also distinguishable from Somerset Classics, Inc., 90 NLRB 1676, enf'd. 193 F. 2d 613 (CA 2), where the Board found Modern Manufacturing Co. to be a co-employer of Somerset's employees and held it responsible for the unfair labor practices committed at Somerset's plant. The Board and the Court emphasized the ownership, control, and operation of the two companies by the same family and the fact that Somerset depended entirely on Modern for its work.

Though the corporate veil may be lifted and the fiction of separate entities may be disregarded on a sufficient showing, the evidence here is not adequate for that purpose. And, as previously observed, there is no evidence that the Oregon corporation actively concerted or participated with Illinois in the commission of the unfair labor practices. N.L.R.B. vs. Lunder Shoe Corp., 211 F. 2d 284, 289 (CA 1). Section 10 (c) of the Act empowers the Board to require unfair labor practices to be remedied by those persons who have engaged in such practices. No provision of the Act authorizes the Board to impose the responsibility for remedying unfair labor practices on persons who did not engage therein. Symns Grocery Co. (Supplemental Decision Amended),

109 NLRB No. 58; N.L.R.B. vs. Birdsall-Stockdale Motor Co., 208 F. 2d 234 (CA 10).

It is, therefore, concluded and found that Respondent Oregon did not engage in, or participate with Respondent Illinois in engaging in, the unfair labor practices found above, and that it may not be held responsible for remedying those unfair labor practices.

APPENDIX B

In determining that the Respondents are separate employers and that therefore Respondent Oregon was not responsible for the unfair labor practices committed at the Carterville plant, the Trial Examiner did not advert to a number of factors of paramount significance. These are: (1) the fact that both Respondents are engaged in manufacturing and selling the same product, and have almost identical names; (2) the fact that A. M. Andrews is the virtual owner of Respondent Oregon, and together with his nephew owns 50 percent of the stock of Respondent Illinois; (3) the fact the officers in both corporations are virtually the same; (4) the fact that the Respondent Oregon lent its credit to Respondent Illinois in the acquisition by the latter of raw materials and machinery—thereby providing the very means whereby the Respondent Illinois could operate; (5) the fact that after the shutdown of the Carterville plant, the raw materials and physical assets of Respondent Illinois were turned over to Respondent Oregon, presumably to be disposed of as the latter might direct; (6) the fact that the labor relations of both corporations were controlled by the same person, the aforementioned A. M. Andrews; and (7) the fact that A. M. Andrews demonstrated his practical control over Respondent Illinois by himself making the vital decision to shut down operations at Carterville. The existence of these factors demonstrates the close integration of the Respond-

ents. They show further, and we so find, that the Respondents constitute a single employer within the meaning of the Act.[6] It follows therefrom, and we also find, that Respondent Illinois is an integral part of a multi-state organization, and that Respondent Oregon is responsible for remedying the unfair labor practices herein found to have been committed.[7]

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[6] Don Juan Co., Inc., 79 NLRB 154, 155 enforced 178 F.2d 625, 627 (C.A. 2); N.L.R.B. vs. Federal Engineering Co., 153 F.2d 233 (C.A. 6); N.L.R.B. vs. Condenser Corp., 128 F.2d 67, 71 (C.A. 3); Somerset Classics, Inc., 90 NLRB 1676, enforced 193 F.2d 613 (C.A. 2); Milco Undergarment Co., Inc., 106 NLRB 767, enforced 212 F.2d 801 (C.A. 3); Wright & McGill Company, 102 NLRB 1035. Cf. N.L.R.B. vs. Stowe Spinning Co., 336 U.S. 226, 227.

[7] In view of our determination that the Respondents constitute a single employer within the meaning of the Act, we do not deem it necessary to consider the Trial Examiner's assumption that the Board may apply one standard in judging corporate-interrelationship for the purpose of asserting jurisdiction and a different one in judging corporate-interrelationship for the purpose of remedying unfair labor practices.

APPENDIX C

NAME	A. M. ANDREWS CO. OF OREGON	A. M. ANDREWS OF ILLINOIS, INC.
Incorporated	Oregon	Illinois
Place of Business	Portland	Carterville
When Incorporated	1951	1954
A. M. Andrews Position	345 shares President	1 share President
Marshall Position	16 shares Vice-president	
Tuttle Position		1 share Vice-president
Brown Position	1 share Treasurer Secretary after July 26, 1954	1 share Treasurer
Lesher Position	1 share Secretary until July 26, 1954, succeeded by Brown	1 share Secretary

No. 14866

In the United States Court of Appeals for the Ninth Circuit

A. M. ANDREWS COMPANY OF OREGON, AND A. M. ANDREWS OF ILLINOIS, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of A. M. Andrews Company of Oregon (herein referred to as Andrews of Oregon) and A. M. Andrews of Illinois, Inc. (herein referred to as Andrews of Illinois), to review and set aside an order of the National Labor Relations Board (R. 54-57) issued against petitioners on September 14, 1954, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*). The relevant provisions of the Act are reprinted *infra,* pp. 19-21. The Board in its answer to the petition requested enforce-

ment of its order (R. 110). This Court has jurisdiction of the proceeding under Section 10(e) and (f) of the Act, inasmuch as petitioner Andrews of Oregon transacts business at Portland, Oregon, within this judicial circuit.[1] The Board's decision and order are reported at 112 NLRB 626.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact [2]

Briefly, the Board found that Andrews of Illinois and Andrews of Oregon were a single employer within the meaning of the Act; that they locked out the employees of the Illinois plant to discourage membership in the International Association of Machinists, AFL, herein called the Union, in violation of Sections 8(a)(3) and (1) of the Act; and that petitioners were responsible for certain threats, interrogations and promises violative of Section 8(a)(1), directed at petitioners' employees by a local Businessmen's Committee. The subsidiary facts upon which these findings rest may be summarized as follows:

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[1] For the 12-month period beginning July 1, 1953, sales by Andrews of Oregon totaled $943,000. Of this amount, $719,000 represented receipts on shipments to purchasers outside the State of Oregon. During the same period raw materials valued at $359,000 were shipped to the Oregon corporation from points outside the State of Oregon (R. 4). During the 3 months in which Andrews of Illinois was in operation, its sales totaled $26,000, of which $22,000 represented receipts from out-of-State sales, and its interstate purchases exceeded $21,000 *(ibid.)*. Petitioners were thus engaged in interstate commerce, and do not challenge the Board's assertion of jurisdiction over their operations.

[2] The facts here set forth are those found by the Trial Examiner and adopted by the Board (R. 3-15, 47). With one exception noted *infra*, p. 7, n. 4, petitioners have stipulated that these findings are to be accepted on this review (R. 114).

A. *Andrews accepts the offer of the Carterville Businessmen's Committee of a plant and "a plentiful supply of labor" for the manufacture of Andrews' plastic hose lawn sprinklers*

Andrews of Oregon is engaged in the manufacture of plastic hose lawn sprinklers. Its president and general manager is A. M. Andrews whose name it bears and who owns over 95 percent of its stock (R. 3).

In 1954, Godfrey Hughes of Southern Illinois, Inc., whose purpose it was to attract industries to Southern Illinois, interested Andrews in opening a plant in that State to manufacture his sprinkler product. In furtherance of this proposal, Hughes arranged a meeting between Andrews and a Committee of Businessmen from Carterville, Illinois, consisting of Lee Hooker, Mack Steffes, Paul Dorcy, and Wes Hayton, who offered both plant and "a plentiful supply of labor" to induce Andrews to select Carterville as the site for his new factory in Illinois (R. 3-5; 69-70). Andrews traveled from Oregon to Carterville to work out the details of this offer, and, as a result, signed an agreement with the Carterville Committee in which it undertook to erect a plant in Carterville for the use of and eventual acquisition by Andrews (R. 3-5; 69-70).

Thereafter, the businessmen of Carterville supplied the funds and the material for the construction of the plant building and Andrews provided the means to finance the new manufacturing operation.

To carry out his part of the agreement, Andrews organized Andrews of Illinois as an Illinois corporation to operate the plant. His Oregon corporation, supplied not only all of the original capital needed for the new venture (including $5,000 paid in for the capital stock

of Andrews of Illinois, and a loan of $63,210.90 for the purchase of materials and for the payment of operating expenses) but in the short time the Illinois corporation was operating "sank" an additional $3,000 into the business (R. 21; 34-35, 88). Two of the Oregon technicians, Milo Smith and James Patterson, were sent to Illinois to oversee the installation of the machinery, to set up the assembly line, and to train the personnel in the new plant. In charge of Andrews of Illinois as managing agent was John Tuttle, Andrews' nephew and an employee of Andrews of Oregon. Tuttle reported directly to his uncle who as a practical matter controlled both corporations, including their labor relations (R. 52; 66, 86-87, 95-96). Andrews of Oregon also supplied all of the credit for the Illinois corporation. It guaranteed payment of all debts and carried on its own books as an account receivable the inventory of raw materials purchased for the Illinois operation. This was done because the suppliers would not extend credit to the newly formed Illinois corporation (R. 3, 4, 51, 52; 68, 73, 74, 75, 88).

Following the shutdown of the Illinois plant a few months later, discussed *infra,* Andrews of Oregon took possession of all of the machinery, none of which had been paid for, the inventory and the raw materials of the Illinois plant, and paid all of its debts (R. 4, 52; 72-75).

The officers and the shareholders of the two corporations interlocked. Andrews, Norman Brown, and Ray H. Lesher [3] occupied the offices of president, treasurer, and secretary, respectively, of each corporation.

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[3] On July 26, 1954, after the shutdown of the Illinois plant discussed *infra*, Lesher resigned as secretary and Norman Brown, the treasurer, was elected to replace him.

Andrews owns 95 percent of the stock of Andrews of Oregon, while the latter two officers each held a single share in that corporation. These three, together with Andrews' nephew, John Tuttle, owned one share apiece in the Illinois corporation. Tuttle acted as vice president and managing agent of the latter. Tuttle returned to Andrews of Oregon after the dismantling of the Illinois plant, discussed *infra* (R. 3, 4, 50, 52; 66).

B. *Andrews learns that the Illinois employees have joined the Union and the new plant is ordered closed*

Andrews of Illinois began to produce the plastic lawn sprinkler on April 27 with five or six employees (R. 6). On May 11, there was a temporary layoff because of insufficient midwestern orders, and a notice explaining this fact was posted for the employees (R. 6). At about that time, one of the employees asked Foreman Patterson about the advisability of bringing a union into the plant (R. 9). The foreman replied that a "Company union" would probably be all right, but he did not think Mr. Andrews would "stand for a large union to come in" (R. 9).

Operations were resumed on May 26, at which time Vice-President Tuttle informed the 38 employees then hired "that the Company had plenty of materials and orders and . . . there would be plenty of work for the rest of the summer" (R. 6).

Unknown to petitioners, the Union during the period of the layoff had conducted an organizational campaign among the employees (R. 6). On the morning of June 1, Vice-President Tuttle received a letter from the Union claiming to represent the Illinois employees and

requesting a meeting for the negotiation of a collective bargaining agreement (R. 6). Tuttle lost no time in telephoning this information to President Andrews in Portland. Andrews ordered Tuttle to stop production and to close the plant (R. 6). Thereupon, Tuttle posted a notice stating that effective as of the regular quitting time on that day, June 1, the plant would be closed (R. 6). Unlike the previous notice, this one specified no reason for the closing (R. 6-7).

C. *The Businessmen's Committee threatens the employees in an effort to defeat the Union; the plant shutdown becomes permanent*

In addition to calling President Andrews about the Union, Tuttle also telephoned the Businessmen's Committee (R. 7). Shortly after 2 p.m. on June 1, the five members of the Committee appeared at the plant to address the employees on the subject of the Union and its request to bargain (R. 7).

Hughes, the Committee spokesman, stated that the Committee had come to the plant because he had received a phone call from Tuttle about the Union (R. 7). He proceeded to read to the employees the Union's letter to the Company (R. 7). Hughes explained that Andrews "would not tolerate a union in the plant" and that the notice on the bulletin board closing the plant was Andrews' "answer" to the Union's letter (R. 7). Hughes also said that though he could probably get another manufacturer into the building, he could not guarantee that any of the present employees would have jobs there (R. 7). He then inquired whether the employees would reconsider their decision to join the Union and suggested that the employees vote on the question (R. 7-8). After some reluctance on the part of the employees to express their sentiment with a

signed written ballot, a majority voted by a show of hands to continue working without a union (R. 8).

After the meeting Hughes represented to Andrews in a long-distance conversation, that he could straighten out the "union trouble" and asked for authority to direct Tuttle to keep the plant open (R. 8, 10). Andrews refused to countermand his decision to shut down the Carterville operation, saying that he would not have a labor union dictate his plans (R. 10).

The meeting lasted from about 2:10 p.m. to 3:00 p.m., time for which the employees were paid (R. 8). Neither Vice-President Tuttle nor Foreman Patterson were present during the meeting; but Tuttle was in the office nearby and Patterson was somewhere else in the plant (R. 7). At some point during the meeting the employees raised a question about their wage rates and about raises. Hooker, one of the members of the Businessmen's Committee, went into the office to "see Mr. Tuttle and get the straight of it," and came back with the information the employees sought, stating that it "was straight from the office" (R. 8, n. 4).

The plant ceased operation at 4:30 p.m. on June 1, and has not since operated except for 2 or 3 days in June or July, when four or five employees were called in to complete a shortage on a Government order (R. 8-9).

On August 3, the Carterville operation was terminated permanently, the inventory and machinery being shipped to the Portland plant (R. 9; 71-72).[4]

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[4] Petitioners declined to stipulate that August 3 was the date of the final closing of Carterville (see R. 114, and p. 2, n. 2, *supra*). The Trial Examiner's finding to that effect, adopted by the Board (R. 9, 47, 51), is supported by the evidence reprinted at R. 71-72.

II. The Board's Conclusions of Law

Upon the above facts and the entire record the Board determined that Andrews of Oregon and Andrews of Illinois were a single "employer" whose operations affected commerce within the meaning of the Act (R. 50-53).[5] The Board found that the decision to close the Illinois plant unlawfully discouraged union membership in violation of Section 8 (a) (3) and (1) of the Act (R. 15-17, 49). In addition, the Board found that the Carterville Businessmen's Committee in attempting to force petitioners' employees to renounce the Union was acting as petitioners' agent and that as such the Committee's actions were attributable to petitioners (R. 11-15). Accordingly the Board found that petitioners violated Section 8 (a) (1) of the Act by the conduct of the Committee in polling the employees as to their union sympathies, warning them that the plant shutdown was Andrews' answer to the Union's bargaining request, stating that Andrews would not tolerate a union in the plant, and threatening that the plant would be moved back to Oregon (R. 14-15).

III. The Board's Order

The Board's order (R. 54-57) requires petitioners to cease and desist from the unfair labor practices found. Affirmatively, the order requires petitioners to make whole the employees discriminated against for whatever sums each would have earned as wages during such plant operations as would have occurred at Carter-

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[5] In this respect the Board's conclusion of law differed from that of the Trial Examiner who concluded that Andrews of Oregon and Andrews of Illinois were separate employers (R. 17-21). The issue is treated *infra*, pp. 9-16.

ville from June 1 to August 3, but for the discrimination, less their net earnings, if any, from other employment during such period. The order further requires petitioners, in the event the Illinois operations are resumed, to offer reinstatement to the aforementioned employees, to pay their moving expenses if the resumption of Illinois operations occurs away from the immediate vicinity of Carterville, and to post appropriate notices.

ARGUMENT

Petitioners in their brief make no attempt to deny that the unfair labor practices found by the Board were committed at the Carterville plant. Petitioners contend only that the Board erred in holding Andrews of Oregon responsible for the admittedly unlawful conduct. We consider first, therefore, the evidence supporting the Board's finding that Andrews of Illinois and Andrews of Oregon constituted a single employer for purposes of the Act, and turn then to petitioners' request that the case be remanded for additional evidence.

I. Substantial Evidence Supports the Board's Finding That Andrews of Oregon and Andrews of Illinois Are So Closely Integrated That They Constitute a Single Employer of the Employees of the Illinois Plant Within the Meaning of the Act

The courts have repeatedly been confronted by the question whether two or more separate corporations under the common control of a single individual or group, and engaged in a related enterprise, constitute a single employer for purposes of the National Labor Relations Act. Recognizing that on final analysis this is a question of fact which "like other findings of fact, is for the Board to make and for [the Court] to review

from the standpoint of substantial evidence," the courts have held that the question of liability for the commission of unfair labor practices is not to be determined by "the corporate arrangements of the parties among themselves."[6] As the Supreme Court observed in speaking of this Act, "its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." *N.L.R.B.* v. *Hearst Publications, Inc.,* 322 U.S. 111, 129. Where, notwithstanding the existence of separate corporations, their "affairs are so interrelated and intertwined," they will be considered a single employer so that "effectual protection [may] be afforded to the employees whose reinstatement with back pay has been ordered by the Board." *N.L.R.B.* v. *Federal Engineering Co.,* 153 F. 2d 233, 234 (C.A. 6).

Applying these general principles the Supreme Court and the courts of appeals have repeatedly sustained the Board in disregarding the corporate fiction in fixing liability for unfair labor practices. Thus in *N.L.R.B.* v. *Stowe Spinning Co.,* 336 U.S. 226, 227, the Supreme Court noted that four separate corporations when united by "interlocking directorates and family ties . . . equal one for our purposes." See also *N.L.R.B.* v. *National Shoes, Inc.,* 208 F. 2d 688, 691 (C.A. 2), and cases there cited; *N.L.R.B.* v. *Federal Engineering Co.,* 153 F. 2d 233, 234 (C.A. 6); *N.L.R.B.* v. *Lund,* 103 F. 2d 815, 818 (C.A. 8); *N.L.R.B.* v. *Calcasieu Paper Co.,* 203 F. 2d 12, 13 (C.A. 5). A consideration of the facts here, compared to those in such cases as *National Shoes, supra,* discloses ample evidence to support the finding

[6] *N.L.R.B.* v. *Condenser Corp.,* 128 F. 2d 67, 71-72 (C.A. 3).

of the Board that Andrews of Illinois and Andrews of Oregon may be regarded as a single employer for purposes of the Act.

The facts summarized at pp. 3-7, *supra*, establish that A. M. Andrews was the dominant figure in both the Oregon and Illinois corporations. That he dominated the Oregon corporation appears from the fact that he was both its president and its general manager, and owned over 95 percent of its stock. While Andrews testified that there were no labor relations problems in Oregon, the record leaves no room for doubt that, as he himself testified, he "naturally" "would handle any labor relations problems" which arose there (R. 66). And quite apart from this admission it is a fair inference that where the president, general manager and virtual sole stockholder are one and the same person, that person will control important questions of labor policy.

That Andrews was equally dominant in the Illinois corporation which bore his name is likewise clear from the record. His stock interest here was technically not controlling; he and his nephew Tuttle each held one share, and the remaining two shares were divided between Lesher and Brown, each of whom also owned one share in the Oregon corporation. But it was Andrews who arranged for the establishing of the Illinois plant; it was Andrews to whom Tuttle promptly telephoned on receiving the Union's bargaining request; it was Andrews who ordered the shutdown; it was Andrews whom the Businessmen's Committee described to the employees as hostile to the Union; it was Andrews to whom the Committee telephoned in an attempt to keep the plant open; it was Andrews who adhered to the decision to lock the employees out.

Further analysis of the record discloses, moreover, that Andrews' dominance of the Illinois operation did not result from his stock ownership, for he owned no more stock than Brown or Lesher or Tuttle. We submit that Andrews' dominance of the Illinois operations resulted from his ownership and control of the Oregon corporation, and that the Illinois corporation was in reality merely an eastward extension of the Oregon operations. In other words, the unfair labor practices which Andrews caused the Illinois corporation to commit, he was able to cause because he dominated Andrews of Oregon, and as we show below Andrews of Oregon controlled and dominated Andrews of Illinois.

The president, secretary and treasurer of the Oregon corporation succeeded to the same offices in Illinois. These three men held over 95 percent of the stock in Oregon; they held 75 percent of the stock in Illinois, and Andrews' nephew, who had been an employee of Oregon, held the remaining stock in Illinois. The interest of the Oregon corporation in the Illinois venture is further shown by the fact that two of the Oregon technicians were transferred to the Illinois operation to set up the assembly line and to train the personnel in the new plant. In addition to the foregoing, the Oregon corporation supplied all of the capital for the Illinois venture, consisting in part of $5,000 paid in for the capital stock of Andrews of Illinois, and approximately $63,000 loaned for the purpose of materials and for the payment of expenses. The Oregon corporation supplied the credit for its Illinois counterpart. The Oregon corporation guaranteed payment of all the Illinois debts and carried the inventory of the raw materials purchased for Illinois. When Illinois operations ceased, all of the Illinois machinery, none of which had been

paid for, and all of the Illinois inventory and most materials were transferred to Oregon, which paid all of Illinois' debts.

In short, officers of Oregon were officers of Illinois, employees of Oregon ran Illinois, money of Oregon established Illinois, and the very products made by Illinois were eventually reclaimed, and presumably sold, by Oregon. These facts, we submit, bring this case squarely within the authorities cited *supra,* p. 10, and establish that for purposes of this Act the two corporations may be regarded as a single employer.

The facts here are closely analogous to those in the *National Shoes* case, *supra,* 208 F. 2d at 690-691. In that case the court held that National Shoes, a concern doing business in New York City, and National Syracuse, a separate corporation doing business in up-state New York, several hundred miles away, constituted a single employer so as to be jointly liable for a refusal to bargain with the union representing the Syracuse employees. The following parallel columns demonstrate the striking similarity between the *National Shoes* case and the case at bar:

Factors relied on by court in *National Shoes*	Comparable facts in case at bar
1. "Both corporations have the same president and secretary-treasurer."	1. Both corporations have same president, same secretary, same treasurer.
2. "These two individuals were the organizers and sole stockholders of the National Syracuse Corporation."	2. These three individuals, together with the president's nephew were the organizers and sole stockholders of the Illinois corporation.
3. "The Board of Directors of National Syracuse is composed of the same individuals, who are the officers of National Shoes."	3. The same individuals, primarily the president, made the decision, *in Oregon,* to close the Illinois plant (R. 67).

4. "The labor policy of the National Shoes, Inc. is determined by the officers among whom is witness Mac Siegel who determines the labor policy of the respondent, National Syracuse corporation."	4. The labor policy of the Illinois corporation was determined by President Andrews, who owned over 95 percent of the Oregon stock and who "naturally" considered himself "as the man who would handle any labor relations problems at both establishments" (R. 66).
5. "Some employees of National Syracuse have been hired at New York City."	5. The chief employees at Illinois were hired in Oregon.
6. "Counsel for both corporations conducted the bargaining negotiations here [where the unfair labor practice was committed] some of which were held at New York City."	6. The president of both corporations ordered the unlawful lockout at Illinois, but gave the order from Oregon.
7. "National Syracuse purchases its merchandise from National Shoes, Inc."	7. The Oregon corporation paid for the machinery and raw materials used in Illinois, and eventually reclaimed both the machinery and the finished products.

After reciting the seven factors set forth above, the Second Circuit concluded (208 F. 2d at 691):

> The relationship between the two corporations, as disclosed above, amply supports the conclusion that the two respondents may be considered as a single employer. *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226 (see note 2, page 227); . . . [citing other cases].

We submit that the same result follows here. As in *N.L.R.B.* v. *Federal Engineering Co.*, 153 F. 2d 233, 234 (C.A. 6), the affairs of the Oregon corporation "are so interrelated and intertwined with those of the [Illinois corporation] as to make it an essential party to this proceeding if effectual protection is to be afforded to

the employees whose reinstatement with back pay has been ordered by the Board."

The *Mount Hope* and *Bonita* cases relied on by petitioners [7] in no way militate against the result urged here; on the contrary, a careful reading of those decisions supports our view. The basic issue actually decided in *Mount Hope* was whether substantial evidence supported the Board's finding that the employer had moved his plant from Massachusetts to North Carolina for the purpose of avoiding bargaining with a union. In discussing that question the court noted that the Board had found the North Carolina corporation to be the *alter ego* of the Massachusetts corporation. In language pertinent here the court stated (211 F. 2d at 372):

> In support of this proposition the Board points out amongst other things that Robert D. Milliken owns 60% of the Massachusetts corporation and 100% of the North Carolina corporation; that the two companies have the same officers and the same name and that 80% of the machinery worth $100,000 and supplies worth $750,000 were sent from Massachusetts to North Carolina and are carried on the books of the North Carolina corporation on open account as purchases yet unpaid for. *These, of course, are significant circumstances;* but the fact remains that the North Carolina business belongs in its entirety to Robert D. Milliken while Daylor owns 36% of the Massachusetts corporation for which he paid $400,000. According to the uncontradicted testimony he has no financial interest in the North Carolina operation and ex-

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[7] *Mount Hope Finishing Co.* v. *N.L.R.B.*, 211 F. 2d 365 (C.A. 4); *N.L.R.B.* v. *Bonita Fruit Co.*, 158 F. 2d 758 (C.A. 5).

> pects it to fulfill its obligations. Under these circumstances we cannot say that the two corporations are one and the same enterprise. [Emphasis supplied.]

The instant record contains similar and more "significant circumstances" indicating that the two corporations should be treated as a single employer, and lacks the factors relied on by the court in the *Mount Hope* case in reaching the contrary result.

The *Bonita* case bears even less resemblance to the case at bar. There the court noted (158 F. 2d at 758-759) that none of the officers or directors of one corporation (Vahlsing) held similar positions with the other (Bonita), and that none of the Vahlsing officers or stockholders even knew of the unfair labor practices which were committed by a Bonita foreman. The court further observed that the foreman's contract of employment was with "Ewing as President of Bonita, Ewing having no interest or authority in Vahlsing, Inc." The very factors on whose absence the Fifth Circuit relied in *Bonita* are present in this case, and impel the opposite result.

II. The Motion to Adduce Additional Evidence Should Be Denied

Petitioners, although moving to adduce additional evidence under Section 10 (e) of the Act, apparently concede (Brief, p. 23), that they do not meet the requirements of that Section that "there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board." Even aside from this compelling reason, petitioners' motion should be denied because the evidence it seeks to adduce is either not material to the issues on this review or is already before the Court.

The first two grounds on which petitioners seek to adduce additional evidence are "financial evidence as to the economic condition of Andrews Illinois" and whether the Board erred in finding "that the closing date of the Carterville plant was August 3" (Brief, p. 23). Since petitioners have conceded that the Carterville lockout was an unfair labor practice, the evidence they seek to adduce would go only to the question of back pay, i. e., when would the Carterville plant have closed for economic reasons. As both the Board and the Trial Examiner noted (R. 21, 49, n. 2), the question as to what date between June 1, 1954 (the day of the lockout), and August 3, 1954 (the date the machinery was shipped back to Oregon) any particular employee or employees would have been laid off for economic reasons is a matter to be determined in back pay negotiations after entry of the decree in this case. See e. g., *N.L.R.B.* v. *Sterling Furniture Co.,* 227 F. 2d 521, 522 (C.A. 9), and the cases there cited and distinguished which, however, are applicable here; see also *N.L.R.B.* v. *Ronney & Sons,* 206 F. 2d 730, 738 (C.A. 9), certiorari denied, 346 U.S. 937; *N.L.R.B.* v. *Cambria Clay Products Co.,* 215 F. 2d 48, 56 (C.A. 6), and cases there cited.

The third matter on which petitioners seek to reopen the record is to procure "additional evidence [to] show more clearly that Andrews Oregon and Andrews Illinois are separate companies" (Brief, p. 23). But neither in the Brief nor in the Motion (R. 108) do petitioners indicate what evidence they have or intend to develop. The Brief contains a single reference (p. 27) to "the supplying of credit by the Oregon corporation to the Illinois corporation," and the Motion merely asks that "additional evidence be taken . . . on the relationship of Andrews Oregon and Andrews Illinois" (R. 108). We respectfully submit that such a vague

request satisfies neither the "materiality" nor the "reasonable grounds for prior failure" tests, both of which must be met under Section 10 (e). Moreover, an affidavit by Andrews on this subject made after the close of the hearing is already a part of the record and was considered by the Board (R. 33-36, 42-44, 48-49). Under these circumstances petitioners' attempt to retry the case should be denied. *N.L.R.B.* v. *Southport Petroleum Co.*, 315 U.S. 100, 103-105; *Southern Furniture Mfg. Co.* v. *N.L.R.B.*, 194 F. 2d 59, 62-63 (C.A. 5), certiorari denied, 343 U.S. 964; *N.L.R.B.* v. *Mastro Plastics Corp.*, 214 F. 2d 462, 466 (C.A. 2), affirmed February 27, 1956.[8]

CONCLUSION

For the foregoing reasons the motion to adduce additional evidence should be denied and the order of the Board enforced.

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MARCH 1956.

[8] Petitioners appear to have abandoned their earlier suggestion (R. 45, 106) that their decision to appear before the Trial Examiner without counsel is grounds for a new trial. See R. 47-48 and the cases holding that absence of counsel will not justify reopening a record. *Roach* v. *Stastny*, 104 F. 2d 559, 562 (C.A. 7); *Baker* v. *Gaskins*, 128 W. Va. 427, 36 S. E. 2d 893, 896-897; *Spoor* v. *Price*, 223 Iowa 362, 272 N.W. 305; *Workingmen's B. & L. Assn.* v. *Stephens*, 299 Ky. 177, 184 S.W. 2d 575, 578; *Winter* v. *N. Y. Life Ins. Co.*, 23 N.Y.S. 2d 759, 760-761. See also 66 C.J.S., New Trial, Sec. 85 (2).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, * * *

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the excercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

* * * * *

Sec. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the

Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, . . . by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the finding of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

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United States
Court of Appeals
For the Ninth Circuit

A. M. ANDREWS COMPANY OF OREGON, et al.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Reply Brief for Petitioners

Petition for leave to adduce additional evidence or for review of a final order of the National Labor Relations Board and an order that the said order of the National Labor Relations Board be set aside.

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HOUGHTON-CARSON COMPANY, PRINTERS

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Petition for leave to adduce additional evidence or for review of a final order of the National Labor Relations Board and an order that the said order of the National Labor Relations Board be set aside.

Petitioners come before this court seeking leave that additional evidence be adduced or that the final order of the National Labor Relations Board be reviewed and the same be set aside. The Order and Decision (R. 46) of the Board which this court should review and set aside concerns itself with (a) whether Andrews Illinois and Andrews Oregon are a single employer within the meaning of the Act, and (b) whether the Committee of Carterville busi-

nessmen were the agents of Andrews Illinois and as such committed an unfair labor practice.

In its brief the National Labor Relations Board sets forth in great detail the facts which lead up to the closing of the Carterville Plant of Andrews Illinois on June 1, 1954. A reading of respondent's brief and the record in this matter discloses that the Board is laboring under the same confusion that troubled the General Counsel in his brief before the Trial Examiner (R. 17).

There can be no doubt that the only reason Andrews Oregon was made a party to this matter by an amended complaint (R. 48) was to secure jurisdiction for the Board. There can be no doubt that the only reason that Andrews Oregon was held to be an employer within the meaning of the Act was that the Illinois corporation never reopened its doors, after they were closed on June 1. Having therefore chosen to ignore the realities of the situation, the Board, like the General Counsel, cannot help but continue to wallow in a morass of confusion.

To start out with, in its brief the Board has chosen to confuse Mr. A. M. Andrews, an individual, A. M. Andrews Company of Oregon, an Oregon corporation, and A. M. Andrews of Illinois, Inc., an Illinois corporation. These are three distinct and separate legal entities and careless language repeatedly used cannot make them one. Illustrative of this amor-

phous "Andrews" which is sometimes Mr. Andrews individually, sometimes one corporation and sometimes the other, is shown on page 3 of Respondents brief. The brief speaks of Mr. Andrews and Andrews Oregon and of the "eventual acquisition (of the Carterville plant) by Andrews (R. 3-5; 69-70)." The record on page 5 states "that the *Illinois corporation* entered into a purchase agreement" for the Carterville plant. (our emphasis)

In its brief before the Trial Examiner the General Counsel urged (R. 17) that "the Oregon corporation operated the Carterville plant as a branch establishment." Now the Board urges (RB. 12) "that the Illinois corporation was in reality merely an eastward extension of the Oregon operations".

Confusion of this type is implicit in the position of the Board.

ANDREWS OREGON AND ANDREWS ILLINOIS ARE NOT A SINGLE EMPLOYER

In its brief the Board argues (RB. 12) that Mr. Andrews controlled the Illinois corporation because he controlled Andrews Oregon. The record is barren of any evidence to support this assertion.

Mr. Andrews was the President of two corporations. He was elected to each office by two separate boards of directors. Those directors were in turn elected by two different sets of stockholders.

In his capacity as President of Andrews Illinois, Mr. Andrews ordered the shutdown of the Carterville plant. Was this act made possible by his relationship with the Oregon Corporation or by his supposed "ownership and control" of it? The answer is a clear and emphatic no. As president of Andrews Illinois, Mr. Andrews was answerable to its Board of Directors and stockholders and to them alone. The fact that Mr. Andrews was also president of Andrews Oregon has nothing to do with his order to close the Carterville plant.

Perhaps the fallacy of the Board's position that Mr. Andrews was able to order the shutdown of the Carterville plant because of his association with Andrews Oregon can best be shown by posing the question: If Andrews Oregon had never existed, would Mr. Andrews have been shorn of his power to order the closing of the Carterville plant? Once again, the answer is no.

THE COMMITTEE OF CARTERVILLE BUSINESSMEN

The Trial Examiner held that Andrews Illinois was liable for certain unfair labor practices committed by the Carterville businessmen. This holding was based upon a theory of agency. These Carterville businessmen were called to the Carterville plant by Mr. Tuttle, the Vice-President of Andrews Illinois, and a man who neither owned stock in nor held a

position with Andrews Oregon. Apparently the Trial Examiner used a theory of agency based upon apparent authority.

While that theory may well be sufficient to hold that Andrews Illinois was guilty of certain unfair labor practices, can it be extended in any way to Andrews Oregon? The answer, quite obviously, is no.

The Carterville businessmen had nothing to do with Andrews Oregon, or it with them. As to Andrews Illinois they were volunteers. As to Andrews Oregon they were strangers. It is this committee that undertook to speak and act for Andrews Illinois and in so doing committed the unfair labor practice. They did not and could not have spoken for or acted on behalf of Andrews Oregon.

It is this very separateness which the Board chose to ignore when it undertook to hold Andrews Oregon the employer of the employees of Andrews Illinois.

There is no evidence in the record, as a whole, which supports the Board's Decision and Order in holding Andrews Oregon responsible for the unfair labor practice which the Carterville businessmen committed.

RESPONDENT'S CASES ARE NOT CONTROLLING

Respondent seeks support in *NLRB v. National Shoes, Inc.*, 208 F. (2d) 688 (2 Cir., 1953). There the Board was seeking an enforcement order which required the respondents National Shoes, Inc., and National Syracuse Corporation to bargain collectively with the union. Here petitioners seek review of the decision and order of the Board which would require Andrews Oregon to make whole the employees of Andrews Illinois who were affected by the unfair labor practice of the Illinois corporation. This order would require Andrews Oregon to pay wages to individuals who were never on its payroll or never in its plant. This is a much different action than the one before the court in the National Shoes case.

There are other differences. National Shoes, Inc., was a distributor of shoes and had about 80 retail outlets in several states. National Syracuse Corporation, while an independent corporation, occupied the same position in the structure of National Shoes as did any one of its 80 outlets. It is to be noted on page 691 "National Syracuse purchased its merchandise from National Shoes, Inc." Respondent in its brief on page 14 states "The Oregon corporation paid for the machinery and raw material used in Illinois * * *" This is not correct. Andrews Oregon merely furnished credit for Andrews Illinois (R. 4) thus enabling the Illinois corporation to make the

necessary purchases from the various suppliers. There was no purchasing from the Oregon corporation of the materials which Andrews Illinois used.

In the National Shoe case, National Syracuse was merely one outlet, among many, and for the purposes of that case was treated as such. It was close to New York City and was part of a large scheme. Andrews Oregon and Andrews Illinois were two separate manufacturing companies, one in Portland, Oregon, the other in Carterville, Illinois. There was a separateness about the two corporations which respondent has chosen to ignore.

The case of *NLRB v. Stowe Spinning Co.*, 336 U. S. 226 (1949) is readily distinguishable. The question for decision was whether there was an unfair labor practice in denying a union organizer the right to use a company-owned meeting hall. The four companies which were held to be one, for the purposes of that case, were all in the town of North Belmont, North Caorlnia.

There was no attempt by the Board to have one company pay the wages of employees of another company. That case discloses that the schools, theater, and the building housing the post ffice were all controlled by the owners of the various mills. If the refusal to let a union organizer use the meeting hall inured to the benefit of one company, certainly it would inure to the benefit of all four of them. That case is of no value in the Board's attempting

to hold Andrews Oregon liable for the wages of the employees of Andrews Illinois.

NLRB v. Lund, 103 F. (2d) 816 (CCA 8th, 1939) is likewise easily distinguishable. In that case the Board was facing the problem of the proper unit for bargaining purposes, not the problem of whether one company should be forced to pay wages to employees of another corporation.

The Northland Ski Manufacturing Company plant was in St. Paul, Minnesota and the plant of C. A. Lund Company was in Hastings, 20 miles away. That the court was concerning itself with the appropriate unit is obvious. In that respect it said on page 818:

> "In other words, Lund would be in a position where he could force competition between the two groups of his employees to their detriment and his gain."

Even if we were to assume that Mr. Andrews were in a position to shift the business from one corporation to the other, as it might suit his fancy, and there is no evidence in the record to support this assumption, it is ridiculous to think that he could force competition between the employees of Andrews Oregon in Portland and those of Andrews Illinois in Carterville.

The nature of the case, the closeness of the two plants, the fact that each corporation sold the products of the other and all of the other different facts

which a reading of the Lund case discloses, make it so far removed from the question which is before this court, that it can have no weight.

NLRB v. Calcasien Paper Co., 203 F. (2d) 12 (5th Cir. 1953) is not in point. Again this case dealt with the appropriate unit. There the plants were 200 feet apart. The payroll of one company was prepared by the other company which also supplied all the raw materials, power and maintenance services.

The cases upon which the Board seeks to rely are not in point.

Respondent in its brief relies on *NLRB v. Stowe Spinning Co.*, supra, *NLRB v. National Shoes, Inc.*, supra, *NLRB v. Lund,* and *NLRB v. Calcasien Paper Co.*, supra.

The Stowe Spinning case is not concerned with a situation which even faintly resembles that which is now before the court. Its facts are entirely different.

Each of the other three cases deals with what is the proper unit for bargaining purposes. Those cases undertake to determine that separate corporations may be obligated to bargain with the union in question. There is a great difference between a holding that certain corporations may be joined together for bargaining purposes and a holding that one corporation must pay the employees of a wholly separate corporation because those employees have been in-

jured by an unfair labor practice with which the first corporation had nothing to do. Even if the cases which the respondent cites, more closely resembled the facts of the case now before this court, they would be of no value value because the remedy there sought is different from what the Board seeks here, namely, to make Andrews Oregon pay the wages of employees whom it never hired.

The case of *Mount Hope Finishing Co. v. NLRB,* 211 F. (2d) 365 (4 Cir., 1954) is controlling. Respondent seeks to distinguish this case by italicizing a sentence in the passage which we quoted on page 16 or our brief, to wit: "These of course are significant circumstances."

Respondent has made clear that which we were apparently unable to do. The ties between the two corporations in the Mount Hope case were considerable, and the circumstances there enumerated were significant but neither the ties nor the circumstances were enough to overcome the very separateness of the two corporations.

The same situation obtains here. There are ties between Andrews Oregon and Andrews Illinois. These ties or similarities are significant, but, as in the Mount Hope Finishing case, they are not sufficient enough to warrant the Board in holding Andrews Oregon and Andrews Illinois a single employer. Rather than saying that the circumstances are significant, the court might well have said, "In spite of

these circumstances there is not enough in the record to support the finding of the Board that the two Mount Hope corporations were a single employer." Likewise, in spite of certain common ties between Andrews Oregon and Andrews Illinois there is not enough in the record to support the finding of the Board that these two corporations, one an Oregon corporation doing business in Portland, Oregon, is an employer of the employees of the other, an Illinois corporation, which did business in Carterville, Illinois.

There is no evidence in the record to support the Decision and Order of the Board as the same applies to Andrews Oregon and therefore this court must review said Decision and Order and set the same aside.

Respectfully sumbitted,

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Alfred A. Hampson, Jr.,

Attorneys for Petitioners

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EULOGIO DE LA CRUZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

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No. 14867

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UNITED STATES COURT OF APPEALS

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APPELLANT'S OPENING BRIEF

STATEMENT

This is an appeal from a judgment and decree of the District Court of California, Southern District, Central Division, Honorable William M. Byrne, Judge presiding, made April 1, 1955, cancelling the certificate of citizenship procured by Appellant, Eulogio de la Cruz on April 11, 1947. No opinion was written. There were, of course, Findings of Fact and Conclusions of Law (C. T. 278).

PLEADINGS

The proceedings were initiated by an affidavit of Reuben Speice, an attorney, Immigration and Naturalization

Service, United States Department of Justice, dated December 6, 1950 (C. T. 8), on the basis of which a complaint was filed on June 5, 1952 (C. T. 2). After an answer was duly filed a pre-trial order was signed by the presiding judge and filed, by which the following admissions and agreements of fact were made by the parties, requiring no proof (C. T. 56-57):

> "1. Plaintiff is a corporation sovereign and this action is brought pursuant to the direction of the Attorney General of the United States and under the provisions of section 338(a) of the Nationality Act of 1940, 8 USC 738 (a) .
>
> * * *
>
> "3. That on or about August 30, 1946, the defendant, Eulogio de la Cruz, filled out and signed an Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization, Form N-400, together with information sheet attached thereto, which was filed with the Los Angeles District Office of the United States Immigration and Naturalization Service on or about November 4, 1946.
>
> "4. That in the proceedings leading up to his naturalization defendant was questioned under oath concerning his qualifications for citizenship

and his right thereto by a Naturalization Examiner of the Immigration and Naturalization Service.

"5. That on or about February 26, 1947, the defendant, Eulogio de la Cruz, who was then an alien and a native of the Philippines, filed petition for naturalization in the United States District Court at Los Angeles, California, under Section 321(a) of the Nationality Act of 1940.

"6. That on or about April 11, 1947, the aforesaid petition was granted by plaintiff, and on said date Certificate of Naturalization No. 6641562 was issued to the defendant, Eulogio de la Cruz, by the Clerk of the United States District Court at Los Angeles, California."

By said pre-trial order the parties agreed that the issues of fact to be tried were (C. T. 57-58):

"1. That the defendant during the years 1937, 1938, 1939 and 1940, or any of them, was a member of the Communist Party of the United States.

"2. That the defendant deliberately and intentionally made false statements at the proceedings leading up to his naturalization.

"3. That the defendant, if he was a member of

the Communist Party of the United States, did conceal his membership in said organization from the Immigration and Naturalization Service and from the Naturalization Court in order to prevent the making of a full and proper investigation of his qualifications for citizenship by the Immigration and Naturalization Service and by the Court.

"4. That the defendant, if he was a member of the Communist Party of the United States, concealed such membership with the intent to defraud the Immigration and Naturalization Service and the Court.

"5. That the Immigration and Naturalization Service and the Naturalization Court relied upon the false statements made by the defendant at the proceedings leading up to his naturalization and relied upon the concealment of the defendant's membership in the Communist Party of the United States in rendering its Judgment of naturalization."

The issues of law to be tried were (C. T. 58-59):

"1. Is the judgment of naturalization res adjudicata, i.e., is it a final judgment conclusive on all issues which were litigated or might have been litigated?

"2. Is concealment of membership in the Communist Party concealment of a material fact?

"3. Does failure to disclose prior membership in the Communist Party, in the proceedings leading up to the naturalization of the defendant, constitute a fraud upon the Court which is that type of fraud which is grounds for collateral attack on a judgment of naturalization, i.e., must it be extrinsic in nature?

"4. Is Section 338(a) of the Nationality Act of 1940, 8 U.S.C. 738(a) illegal and unconstitutional as construed and applied by the plaintiff in that it would deprive the defendant of rights guaranteed to him by the First, Fifth, Sixth, Ninth and Tenth Amendments of the Constitution of the United States? And in particular, is said Act illegal and unconstitutional if the defendant did not personally believe or advocate the proscribed doctrines of such organization."

THE EVIDENCE

The appellee set out to prove the following:

(1) That Appellant was a member of the Communist Party in the years 1938 and 1939.

(2) That he concealed his membership from the

Immigration and Naturalization Service; and

(3) That the Communist Party in 1938 and 1939 was an organization which advocated the forceful and violent overthrow of the United States Government.

Membership

Through three witnesses the Appellee adduced the following facts:

(1) That over a period of three or four months in 1938 and possibly 1939 the Appellant attended several "closed" Communist Party meetings.

(2) The witness, Josue, testified to seeing a Communist Party book in Appellant's possession and discussing with Appellant possible recruits for the Communist Party.

(3) The witness, Manzano, testified to Appellant's collection of dues from him on one occasion.

No attempt was made to prove that Appellant paid dues. Nor was an attempt made to show that Appellant knew of or accepted any of the proscribed aims and objectives of the Communist Party.

Concealment

The evidence relied upon by Appellee was that in answer to a question on supplemental form 400 (Plaintiff's Exhibit 1) to list all of the organizations of which Appellant had been a member within the last ten years the Appellant

failed to mention the Communist Party. The Government called two Immigration and Naturalization Service employees who testified that they had no independent recollection of the defendant or of what questions they asked him. Relying upon their "invariable practice" they testified that in the normal course of events they would have gone over Plaintiff's Exhibit 1 with Appellant to determine whether he wanted to make any changes. Neither of these witnesses had any transcript of the proceedings of their examination. Neither at any time asked Appellant if he had ever been a member of the Communist Party. They did ask him if he belonged to any organization that was anarchistic or subversive and Appellant answered that question in the negative. There is no claim here that that answer was false or that Appellant was guilty of fraud in so answering that question.

In the course of the examination of the witness, Lechner, it appeared that prior to the naturalization of Appellant the Immigration and Naturalization Service requested of the F. B. I. certain information and mailed to the F. B. I. certain forms to be completed by the F. B. I. regarding Appellant. By motion and subpoena Appellant sought unsuccessfully to obtain these reports for the purpose of showing that the Immigration and Naturalization Service had all of the facts (including Appellant's connection

with the Communist Party) prior to the time he was naturalized and that as a matter of fact Appellee did not rely upon anything Appellant said or failed to say.

Nature of The Communist Party

The Government relied primarily on a slew of books to prove that in the years 1938 and 1939 the Communist Party advocated the forceful and violent overthrow of the Government. Most of these books were before the United States Supreme Court in Schneiderman v. United States, 320 U.S. 118 (1943). Additionally, the Government called two witnesses who testified as to what they had been told regarding the aims and purposes of the Communist Party, both stating in effect that the aims were to substitute a communist form of government for the capitalist form of government peacefully if possible but by force if necessary.

There was no testimony showing that Appellant knew of these aims and purposes of the Communist Party or that he personally approved them. On the contrary the testimony strongly suggests that in 1938 and 1939 the Communist Party was believed to be a peaceful, democratic, anti-fascist, pro-labor party.

THE STATUTES INVOLVED

The pertinent statutes are Section 305(b) (1) and Section 338(a) of the Alien and Nationality Act of 1940. *

* Both sections have been superceded by the Alien and Nationality Act of 1952.

Section 305(b) (1) provides:

"No person shall hereafter be naturalized as a citizen of the United States . . . . (b) who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates or teaches -

(1) The overthrow by force or violence of the Government of the United States or of all forms of law; . . . "

Section 738(a) provides:

"(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

JURISDICTION OF COURT OF APPEALS

The jurisdiction of this Court is based upon 28 U. S.

Code, section 1291.

SUMMARY OF ARGUMENT

The District Court's Judgment, denaturalizing Appellant, should be reversed for the following reasons:

(1) The Government failed to prove by clear, convincing and unequivocal testimony that Appellant was a member of the Communist Party.

(2) The Government failed to prove by clear, convincing and unequivocal testimony Appellant's intent to defraud.

(3) Since Appellant had no personal knowledge of or belief in the proscribed views of the Communist Party he may not be denaturalized even if he was a member of the Communist Party in 1938 and 1939.

(4) The judgment of naturalization is a final judgment and conclusive on all issues of fact which were, or might have been litigated and is res judicata.

(5) Appellant was wrongfully denied the opportunity of showing that the Government was not deceived.

ARGUMENT

I

The Government Failed to Prove by Clear, Convincing and Unequivocal Testimony that Appellant was a Member of the Communist Party.

At the outset it should be remembered that this being a denaturalization case the evidence must be clear, convincing and unequivocal.

Knauer v. United States, 328 U. S. 654.

Baumgartner v. United States, 322 U. S. 665.

Schneiderman v. United States, 320 U. S. 118.

Klapprott v. United States, 335 U. S. 601.

This term the United States Supreme Court twice reiterated the rule, Gonzales v. Landon, 350 U. S. 920; United States v. Minker, 350 U. S. 179, 187.

Since citizenship is one of our most precious possessions the government "must cut square corners", Anastasio v. United States, 226 F. 2d 912, in a proceeding to revoke citizenship.

In this case there was absent the necessary "solidity of proof". The three witnesses who identified appellant as having been a member of the Communist Party in the years 1938 or 1939 were testifying about events which occurred approximately 16 years previously. Any testimony that old is necessarily, by the mere passage of time, unreliable.

United States v. Chase, 135 F. Sup. 230. Observing that memories of long-past events are clouded, the Court there said:

> "They could not be said after that length of time to be testifying to what they remember; they would be recalling something as in a dream, a kind of phantasmagoria, rather than an independent recollection. The human mind is so constructed that remembrance of even the sharpest experience dulls with time. Witnesses, however honest, could not respond with any accuracy to cross-examination . . . "

That the above observation was applicable to the instant case is indicated by the number of times that a witness stated he could not remember an event because it happened so long ago. (R. T. 185; 198; 207; 256; 263.)

Each of the witnesses who identified appellant as having been a member of the Communist Party had, himself, been a member of the Communist Party, and each had become naturalized. Accordingly, they had a strong motive to favor the government since to provoke the government's displeasure might visit upon them appellant's fate. In United States v. Hauck, 155 F. 2d 141, the court said of a witness in a similar position:

> "He also had a motive for favoring the government

for he himself had been a member of the Bund and his petition for naturalization was still pending."

Moreover, since each of the witnesses testified to having been in the Communist Party with appellant, they were akin to accomplices and their testimony must, of course, be received with the greatest caution.

With these preliminaries out of the way, what was the evidence of appellant's membership in the Communist Party? The totality of the testimony of the three witnesses (Josue, Campos and Manzano) amounts to this:

1. That over a three or four month period in late 1938 or early 1939 the appellant attended approximately 7 or 8 meetings at the apartment of a Mr. Blue, which meetings were alleged to have been "closed" Communist Party meetings.

2. Josue testified to seeing a Communist Party membership book in the possession of appellant and allegedly discussing with appellant possible recruits for the Communist Party.

3. Manzano testified to appellant's having collected dues from him on a single occasion.

The only solid proof the government adduced at the trial was that appellant attended so-called closed meetings at Blue's apartment in 1938 or 1939. But this proof falls far short of proving that appellant was then a member of the

Communist Party.

In Bridges v. United States, 199 F. 2d 811 (C. A. 9th, 1952) this Court said:

> "It is true that a number of the witnesses described some of these meetings which Bridges attended, and at some of which he presided as 'closed' Communist meetings. The logical fallacy in concluding from this that Bridges must therefore have been a party member is that it assumes the truth of that which is sought to be proven. If, in fact, Bridges was not a party member, his presence at such a meeting would mean no more than he attended a meeting at which every other person present was a party member."

See also Acosta v. Landon, 125 F. Sup. 434.

The process by which a witness assumes membership from presence at a so-called closed meeting is revealed in the testimony of Campos (R. T. 360 - 361).

> "Q: Now the first time that you went to a meeting at Blue's house there were about 6 people there whose names you gave us yesterday, isn't that so?
>
> "A: Yes, sir.
>
> "Q: And you told us yesterday that they were all members of the Communist Party at

that time, didn't you?

"A: Yes, sir.

"Q: How did you know that they were members of the Communist Party?

"A: Espe brought us there and Espe was supposed to know all the members that belongs to the Party, so he brought us there too from that school there, that is all I know."

In the case at bar the government introduced the constitution of the Communist Party as its Exhibit 8. The government attorney then read from Article III (R. T. 546):

"Section 2. A party member is one who accepts the party program, attends the regular meetings of the membership branch of his place of work or of his territory or trade, who pays dues regularly and is active in party work."

Further on, the U. S. Attorney read from plaintiff's Exhibit 13 dealing with membership as follows (R. T. 559):

"You will observe that all of the specific requirements for membership in the Party aim at one thing, namely, the active, conscious and disciplined participation in the struggles of the masses that are led and organized by the Party. There can be nothing formal, or blind, or passive about membership in the Party, because the Communist Party is the revolutionary

vanguard of the working class. Initiative on the part of every member, creative activity for winning and organizing the masses, and discipline in carrying out of the decisions of the Party and of the Communist International are the very essence of the Communist Party membership."

This Court has recently indicated that a person may not be a member of the Communist Party unless he complied with the Party's formal requirements as stated in its constitution.

Fisher v. United States, 14731, Feb. 15, 1956.

We submit that by the standards set by the Communist Party for membership in that organization appellant simply was not a member. There was no showing that he paid dues, that he was active or that he was anything but a passive attendant at the meetings at Lee Blue's. It is interesting that each of the witnesses described the meetings at Lee Blue's as a kind of school. (R. T. 125-126, 295, 335, 336, 452.) When we remember that the appellant's claimed membership was for a very short period of time in late 1938 or early 1939, and that in those years many persons, citizens and aliens alike, became connected with the Communist Party in one way or another, and did so not out of ideological sympathy with the Communist Party or from any knowledge of, or even remote apprehension of its

doctrines, this case will be in better focus.

The 1938 - 1939 program of the Communist Party as described by the Government's witness Honig (R. T. 842-844) appears laudable. It is true Honig described it as "spider-and-fly tactics" (R. T. 849). And Kimple said: "It was a stepping-stone to reach the workers who might be a little bit slow to an out-and-out communist appeal" (R. T. 881). And the trial Judge said (R. T. 884-885):

> " . . . You asked him if he was taught these various things. Now, he has stated he had been taught those things. And he said they taught those things to the labor people or working people, and so forth, in order to bring them into the party if they couldn't be convinced. In effect, he stated then, of course, they were to teach these various things that you speak of because they'd have an appeal to the working man . . . "

If the Communist Party in 1938 and 1939 advocated forceful and violent overthrow of the government it is clear that appellant knew nothing of this objective and therefore it cannot be said that he belonged. Plaintiff's Exhibits 8 and 13 (R. T. 546, 559) make it clear that to be a member of the Communist Party a person must "accept the party program".

An instructive case on this point is Baghadasarian v. United States, 220 F. 2d 677, where the Court held that a woman whose husband had enrolled her in the Communist Party, obtained a Communist Party book for her and paid her dues was not a member of the Communist Party even though she failed to take any step to dis-associate herself from the Communist Party after she found the Communist Party book bearing her name, and even though she turned over to the Communist Party her husband's checks in payment of her dues. In reversing the trial court's holding that the wife was a member of the Communist Party the Court of Appeals for the First Circuit said:

> "The defendant's husband had no authority to enroll her as a member of the Communist Party. There was no evidence that there was any express ratification of the husband's action or that the defendent ever accepted any of the benefits, if there were any, of her enrollment in the Party."

II

The Government Failed to Prove by Clear, Convincing and Unequivocal Testimony Appellant's Intent to Defraud.

Appellee's entire case on Appellant's alleged intent

to defraud the Government is set forth in Findings of Fact VI, VII and VIII (C. T. 280-281), the most important of which is Finding VI which reads as follows:

> "That the defendant, Eulogio De La Cruz, in the course of proceedings leading up to his naturalization, alleged, on August 30, 1946, in his Preliminary Application to file a Petition for Naturalization, that during the preceding ten years he had been a member of the following organizations and no other: Cannery Workers Union, Ilocannisis Fraternity, Inc., and Philippine Community of the Los Angeles Harbor Area."

Since neither the Naturalization Officer Lechner (R. T. 21) or Woodward (R. T. 81) had an independent recollection of Appellant or the testimony he gave in connection with his naturalization proceedings both relied exclusively upon their "invariable practice" (R. T. 22, 82). From their "invariable practice" they assumed that they asked Appellant the same questions that were covered in the Preliminary Application (Plaintiff's Exhibit 1) and received answers consistent with those appearing on the Preliminary Application. It should be remembered that both Lechner and Woodward examined Appellant on the same day and apparently within a very short time of one another.

Here again we see how memory of events long past

become clouded and the consequent evidence rendered unsatisfactory. In Cufari v. United States, 217 F. 2d 404, the Court of Appeals struck down a denaturalization judgment which rested upon "invariable practices" of deceased Immigration and Naturalization Service examiners. It is true that here the examiners were alive and testified to their invariable practice while in the Cufari case it was the District Director who testified regarding the "invariable practice" of the deceased examiners. But the reasoning of the Court in Cufari is here applicable, since the vice lies in having to rely upon "invariable practice" rather than remembered events.

Even if Appellant answered the same question the same way three times the case for the Government is no stronger than if he merely answered the question a single time. See Boyer v. United States, 132 F. 2d 12.

As we have shown in Point I there is a substantial question as to whether Appellant was a member of the Communist Party since he apparently failed to comply with all of the Party's formal requirements. Whether Appellant was or was not a member of the Communist Party he may honestly have believed that he was not, in which case he would not be guilty of fraud even if it should ultimately be determined that he was in fact a member of the Communist Party.

This Court apparently adopted that position in the recent case of Fisher v. United States, No. 14731, February 15, 1956, where the Court said:

> "Appellant contends that he might honestly state he was not a member if he failed to comply with any of the Party's formal requirements for membership as stated in its constitution. The Government does not answer this contention in their brief."

It should be remembered that Appellant was never asked whether he had been a member of the Communist Party. The Government's position is that proof of the fact that Appellant was a member of the Communist Party within ten years of his naturalization was proof that he concealed this fact with the intent of defrauding the Government. But mere proof of objective falsity does not make out a case of fraud. In United States v. Gilbert, 121 F. Supp. 414, the Court said:

> "It must be shown that the naturalized citizen knew his statements were false and intended that such false statements should deceive the court."

A long line of cases teach us that fraud is never presumed.

Reilly v. Pinkus, 338 U. S. 269.

United States v. Wunderlich, 342 U.S. 98.

United States v. Colorado Anthracite Co., 225 U. S. 219.

Jones v. Simpson, 116 U.S. 609.

United States v. Teuter, 215 F. 2d 415.

Jeffries v. Olesen, 121 F. Supp. 463.

See Morrisette v. United States, 342 U.S. 246.

Where, as here, "intent to defraud" is put in issue, the Government, of course, must prove scienter. United States v. Teuter, 215 F. 2d 415. This may not be accomplished by inference, leaving the issue to surmise. There must be a "solidity of proof which leaves no troubling doubt in deciding a question of such gravity". Schneiderman v. United States, supra; Baumgartner v. United States, supra; Klapprott v. United States, supra; Gonzales v. Landon, 350 U.S. 920.

In view of the short period of time Appellant was shown to have been connected in any way with the Communist Party, and in view of the informal and educational nature of the meetings at Blue's apartment as testified to by Josue, Compos and Manzano and the passive part played by Appellant he may have felt that he was on probation with the Communist Party but was never a member in which case he would not be required to mention the fact to the Immigration and Naturaliazation Service, Baghadarian v. United States, 220 F. 2d 677.

It is entirely possible that Appellant believed that church affiliations and political affiliations were not the kind of organizations that were referred to in Plaintiff's Exhibit 1. For example, no mention is made on this form as to Appellant's religious affiliation and this was probably omitted because Appellant did not believe that this type of information was sought by the Government.

In Zebouni v. United States, 226 F. 2d 826 Appellant was convicted of knowingly making a false statement under oath in a proceeding relating to his naturalization. The question on appeal was whether the proof established Appellant's knowledge of the falsity of the statement he made and his criminal intent. In his application for a certificate of arrival and preliminary form for petition for naturalization the defendant was sworn and made the following answer under oath:

> "24) Have you, either in the United States or in any other country, been arrested, charged with violation of any law or ordinance, summoned into court as a defendant, convicted, fined, imprisoned, or placed on probation or parole, or forfeited collateral for any act involving a felony, misdemeanor, or breach of any public law or ordinance? If so, give date, place, offense, and disposition . . . no . . . . . "

The answer was false. The defendant explained the false answer stating that he thought the question only related to whether he had been in jail and since he had not been in jail he answered the question in the negative. In reversing the conviction the Court of Appeals emphasized that courts have thrown up unusual safeguards against erroneous convictions for perjury and that:

> "Like considerations lead us to believe that the standards of guilt of criminal offenses should not be relaxed in charges under this statute comparable to the crime of perjury."

Here too the charge is comparable to the crime of perjury and the Appellant must be afforded "unusual safeguards". See United States v. Otto, 54 F. 2d 277, 279; McWhorter v. United States, 193 F. 2d 982, 983.

III

Since Appellant Had No Personal Knowledge of Or Belief In The Proscribed Views Of The Communist Party He May Not Be Denaturalized Even If He Was a Member of The Communist Party in 1938 and 1939.

By Conclusion VI (C. T. 285) the Trial Court held that Appellant's "naturalization was illegally procured in that his naturalization was prohibited by Section 305 of the Nationality

Act of 1940, 8 U. S. C. 705 in that, within the period of ten years immediately preceding his filing for petition for naturalization he had been a member of the Communist Party of the United States, an organization which engaged in activities proscribed by that Section." It should be observed preliminarily that "illegal procurement" was not pleaded nor was it within the issues framed by the pre-trial order (C. T. 56).

In Schneiderman v. United States, 320 U. S. 118, 160 the Supreme Court held that in denaturalization cases judgments must be confined strictly within the scope of the charge laid:

> "As we said in DeJonge v. Oregon, 'conviction upon a charge not made would be sheer denial of due process' 299 U. S. 353, 362. A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status. Consequently, we think the Government should be limited, as in a criminal proceeding, to the matters charged in [the] complaint."

Moreover, the United States Supreme Court recently held that a person may not be deprived of public employment for membership in a proscribed organization if that person did not have knowledge of the proscribed purposes of the

organization, Wieman v. Updegraff 344 U. S. 183. Mr. Justice Clark there said:

> "But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. 'They had joined, (but) did not know what it was; they were good, fine young men and women, loyal Americans, but they had been trapped into it -- because one of the great weaknesses of all Americans, whether adult or youth, is to join something.' At the time of affiliation, a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends. Conversely, an organization formerly subversive and therefore designated as such may have subsequently freed itself from the influences which originally led to its listing.
>
> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds . . . Yet under the Oklahoma Act, the fact of association

alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources."

It follows, a fortiorari, that if a person may not be denied public employment for "innocent" membership in a proscribed organization he certainly may not be denied his more precious right of citizenship.

Moreover, there was no clear, convincing and unequivocal evidence that the Communist Party in 1938 and 1939 advocated the forceful and violent overthrow of the Government. If this case were to be decided by the same court which decided Schneiderman v. United States, 320 U.S. 118, there can be little doubt that the result would be the same. For this case is Schneiderman all over again except that it arises in 1954. The circumstances that Schneiderman involved the Communist Party of the mid 1920's while this case relates to the Party in the late 1930's makes no difference which aids the Government.

In the Schneiderman case the Government asserted that the Communist Party advised, advocated and taught the overthrow of the Government. The Supreme Court dealt with this assertion first by calling attention to the transient and

topical character of the polemical political writings:

> " . . . In the first place this phase of the Government's case is subject to the admitted infirmaties of proof by imputation. The difficulties of this method of proof are here increased by the fact that there is, unfortunately, no absolutely accurate test of what a political party's principles are. Political writings are often over-exaggerated polemics bearing the imprint of the period and the place in which written. Philosophies cannot generally be studied in vacuo. Meaning may be wholly distorted by lifting sentences out of context, instead of construing them as part of an organic whole. Every utterance of party leaders is not taken as party gospel. And we would deny our experience as men if we did not recognize that official party programs are unfortunately often opportunistic devices as much honored in the breach as in the observance. On the basis of the present record we cannot say that the Communist Party is so different in this respect that its principles stand forth with perfect clarity, and especially is this so with relation to the crucial issue of advocacy of

force and violence, upon which the Government admits the evidence is sharply conflicting. The presence of this conflict is the second weakness in the Government's chain of proof. It is not eliminated by assiduously adding further excerpts from the documents in evidence to those culled out by the Government . . . . ".

The "sharp conflict" on the "crucial issues" was noted to be within the literature itself:

" . . . The reality of the conflict in the record before us can be pointed out quickly. Of the relevant prior to 1927 documents relied upon by the Government three are writings of outstanding Marxist philosophers, and leaders, the fourth is a world program. The Manifesto of 1848 was proclaimed in an autocratic Europe engaged in suppressing the abortive liberal revolutions of that year. With this background, its tone is not surprising. Its authors later stated, however, that there were certain countries, 'such as the United States and England in which the workers may hope to secure their ends by peaceful means.' Lenin doubted this in his militant work, The State and Revolution, but this was written on the eve of

the Bolshevist revolution in Russia and may be interpreted as intended in part to justify the Bolshevist course and refute the anarchists and social democrats. Stalin declared that Marx's exemption for the United States and England was no longer valid. He wrote, however, that 'the proposition that the prestige of the Party can be built upon violence . . . is absurd and absolutely incompatible with Leninism.' And Lenin wrote 'In order to obtain the power of the state the class conscious workers must win the majority to their side. As long as no violence is used against the masses, there is no other road to power. We are not Blanquists, we are not in favor of the seizure of power by a minority.' The 1938 Constitution of the Communist Party of the United States, which petitioner claimed to be the first and only written constitution ever officially adopted by the Party and which he asserted enunciated the principles of the Party as he understood them from the beginning of his membership, ostensibly eschews resort to force and violence as a element of Party tactics. . . ."

From this analysis based on a searching examination of virtually the same literature received in the case at bar

the Supreme Court drew the ultimate conclusion that the Party's approach to the question of force and violence was shown to be no more advocacy than prediction:

> ". . . A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open . . ."

A respected student of philosophy has reached much the same conclusion as the Supreme Court and his views bear quoting at some length, Somerville, A Key Problem of Current Political Philosophy: The Issue of Force and Violence, 19 Philosophy of Science, 156-165:

> ". . . The innumerable discussions of these problems which have fallen to the writer's lot to examine in recent years have convinced him that endless confusion can result from the failure to make two major distinctions.

One is that which we have been discussing: the distinction between advocating and predicting. In the writings of Marxian authorities, considerable attention is given to revolution in the sense in which we are discussing it: violent overthrow of government. However, after a systematic examination of these writings, one is forced to conclude that the treatment of this theme represents, in the main, an attempt to analyze and predict under what conditions revolutions occur, and under what conditions they are beneficial. One does not find a blanket advocacy of violent revolution, as if it were considered a good thing in itself.

"The tone of their discussion conveys, for the most part, the impression that forceful revolutions are regarded as a kind of symptom of social breakdown, and that it would be much better if fundamental social changes took place peacefully. One finds a very different tone, in regard to this point, in schools of social philosophy like Nazism and Fascism. Mussolini and Hitler, for example, in their writings, expressed a clear preference for war over peace,

actually evaluating war in itself as a higher form of conduct.

"In the Marxian school the position taken is that no social system lasts forever; each system goes through a cycle of growth and finally breaks down, giving way to a new system. Marx, Engels and other writers point out, with ponderously interminable scholarship, how early primitive tribal society breaks down and gives rise to the ancient slave system, how the slave system breaks down and gives rise to the feudal system, how the feudal system breaks down and gives rise to the capitalist system. Marx and Engels noted that, in each case, the breakdown was not altogether a peaceful process, but was one that involved, here and there, revolutions, riots and various forms of civil strife. In their hypothesis, to put it bluntly, this was usually because the ruling class within the dying social system refused to meet the needs and demands of the majority of the people, and made necessary an armed struggle before the will of the majority could prevail.

"Whether Marx and Engels were right or

wrong in this hypothesis, it is clear they drew the conclusion that, since previous fundamental changes had involved violent revolution, the breakdown of capitalism would, in all probability, also involve revolutions of that kind -- at least, in certain countries. In this reasoning of theirs they were clearly making a prediction, not advocating a preferential method. There is no ambiguity here, because, as we have noted, where Marx and Engels saw any possibility of peaceful change, they specifically pointed to, and unequivocally recommended it.

"In other words, one might predict deaths, wars, accidents or disease without being accused of advocating them. Modern medicine, for instance, teaches the germ theory of disease. It teaches us to be conscious of germs, to know of their existence. It tries to make predictions about them, to utilize and control their behavior. But we should never countenance the conclusion that modern medicine is thereby advocating the pathogenic action of germs, as if it liked or preferred such action, out of some inhuman perversity or callous morbidity . . . . "

Of course, if the Communist Party in 1938 and 1939 did not advocate forceful and violent overthrow of the Government the Appellant could not be denaturalized under either theory advanced by the Government. Even if the Communist Party in 1938 and 1939 did advocate the forceful and violent overthrow of the Government Appellant could not be denaturalized for "illegal procurement" in the absence of a showing of knowledge and acceptance by Appellant of the proscribed aims of the Party. Similarly, he could not be denaturalized as having procured his citizenship fraudulently since membership in 1938 and 1939, without proving knowledge and acceptance of the proscribed views of the Party, was not a material fact. Wieman v. Updegraff, 344 U.S. 183.

It is of course settled law that there must be concealment of a material fact with intent to defraud before a citizen may be denaturalized on this ground United States v. Kessler, 213 F. 2d 53; United States v. Fraser, 219 F. 2d 844. A material fact is one which if known at the time of the naturalization proceeding would have itself disqualified a person from citizenship. In United States v. Kessler, supra, the Court of Appeals sitting en banc noted that they "have found no decision and none has been cited to us where citizenship has been revoked for failure to disclose facts the revelation of which would not have justified refusal

of citizenship in the first place". In United States v. Fraser, supra, this court applied the same rule where the person was applying for naturalization, an area where admittedly the person has less protection than in a denaturalization proceeding.

It should be remembered that membership in the Communist Party was not a statutory bar to naturalization in 1947. It wasn't until 1950 that the Communist Party was first named as a proscribed organization. That mere membership in the Communist Party in the years 1938 and 1939 did not bar a person from becoming a citizen is clear from the fact that three of the Government witnesses, Josue, Compos and Manzano, were each naturalized and no proceedings were instituted by the Government to denaturalize them even though each admitted membership in the Communist Party in the years 1938 and 1939.

IV

The Judgment of Naturalization is a Final Judgment and Conclusive on All Issues of Fact Which Were, or Might Have Been Litigated And Is Res Judicata.

A judgment of naturalization is appealable. Fraser v. United States, 219 F. 2d 844; Tatun v. United States, 270 U. S. 565. Accordingly, as with other judgments, it may

only be attacked for extrinsic fraud, United States v. Throckmorton, 98 U.S. 61; United States v. Kusche, 56 F. Supp. 201; United States v. Korner, 56 F. Supp. 242. In United States v. Throckmorton, supra, the Court said:

> "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; --- these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing."

Absent extrinsic fraud, a judicial determination granting citizenship, is protected by the principles of res judicata. United States v. Pandit, 15 F. 2d 285, cert. den. 273 U.S. 759.

It is clear that the Government could have litigated the issue of Appellant's alleged membership in the Communist Party in the naturalization court and could have taken an appeal if it was dissatisfied with the decision.

The United States Supreme Court has specifically reserved decision on the question of the finality of a judgment of naturalization saying in Knauer v. United States, 328 U. S. 654:

> "We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, the establishment of which Congress has made a condition precedent to naturalization."

It should be recalled that mere naked membership in the Communist Party in the years 1938 and 1939 without any knowledge of or belief in the proscribed aims and purposes of the Communist Party would not have been a bar to naturalization. See Wieman v. Updegraff, 344 U. S. 183.

V

Appellant Was Wrongfully Denied The Opportunity Of Showing That The Government Was Not Deceived.

This being a fraud action the Government of course may not prevail unless there was deception in fact. If for example prior to February 26, 1947, the date of filing of the Petition for Naturalization, the Government knew that Appellant was a member of the Communist Party in the years 1938 and 1939 but nevertheless decided to recommend citizenship it may not now seek to revoke citizenship for

that membership United States v. Anastasio, 226 F. 2d 912, 917 :

> "An essential element of fraud is that the complaining party must have been deceived by the fraudulent statement of the accused. If this element is lacking the accused has failed in his purpose to defraud."

See 23 Am. Jur. on Fraud and Deceit, section 20; Equitable Life Insurance Co. of Iowa v. Halsey, Stuart & Co., 112 F. 2d 302, 308; Knauer v. United States, 328 U. S. 654.

In the Anastasio case Appellant was naturalized in 1943. In 1952 the Government instituted proceedings under the Nationality Act of 1940 to denaturalize him on the ground that his citizenship had been illegally procured and was based on a fraudulent certificate of registry issued in 1931. The 1931 certificate of registry was concededly obtained by misrepresentations, Anastasio there falsely stated that he had never been arrested. This certificate of registry was clearly a part of the naturalization proceedings ultimately ending in Anastasio's obtaining citizenship in 1943.

In 1943 Anastasio gave the Immigration and Naturalization Service an affidavit stating the true facts about his arrests and withdrew his then pending application for naturalization. Subsequently in 1943 he again applied

for citizenship and his application was granted, one of the necessary papers being the 1931 certificate of registry. In the proceeding to revoke citizenship the Trial Court held that since the 1931 certificate of registry was a necessary part of the naturalization proceedings and since it was fraudulently procured the subsequent naturalization was also fraudulently procured. In reversing, the Court of Appeals held, inter alia, that the Government was not deceived by Anastasio's misrepresentations. Before reaching this conclusion the court citing Schneiderman v. United States, 320 U.S. 118, Klapprott v. United States, 335 U.S. 601, and Baumgartner v. United States, 322 U.S. 665, restated the rules applicable to denaturalization cases:

> "The burden is on the Government to establish by 'clear unequivocal and convincing' evidence which does not leave 'the issue in doubt' that the defendant has been guilty of fraud or illegal conduct in his naturalization proceeding.
>
> "There must be a '. . . solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen'.
>
> "In a denaturalization case '. . . the facts and the law should be construed as far as

is reasonably possible in favor of the citizen'."

The Court of Appeals concluded that "the Government has failed to establish by the strict burden of proof imposed upon it that the defendant had 'deceived' it into recommending citizenship in 1943" because someplace in the files of the Immigration and Naturalization Service all of the facts regarding Anastasio were correctly reported. This was held to bar the Government from claiming fraud even though the Immigration and Naturalization Service examiner who recommended citizenship did not himself have the whole file in his possession when he was examining Anastasio and did not himself know that the 1931 certificate of registry was fraudulently obtained.

Observing that Anastasio had an unsavory background the court said:

> "But the very fact that extrinsic considerations may operate to make the Government zealous in its prosecution should make the courts equally zealous to see that there be conformance to the letter and spirit of the naturalization laws." (Emphasis in original.)

See also Petition of Provoo, 17 F. R. D. 183, 196.

Turning to the case at bar it appears that prior to the time Appellant was naturalized the Immigration and

Naturalization Service mailed to the F. B. I. forms G-58 and G-59 (R. T. 50-54). The witness Lichner testified that he did not know whether the report from the F. B. I. was before him when Appellant came to his office on February 26, 1947 prior to his naturalization (R. T. 53-54). Forms G-58 and G-59 were identical, each going to a different department of the F. B. I. (R. T. 58). The witness could not recall all of the information that was requested on form G-58 (R. T. 58).

The Court sustained the Government's objection to the question "To what Department did G-58 go, if you know?" (R. T. 58), stating erroneously "He has already testified he hasn't seen any such thing any way at all, other than the papers he has referred to" (R. T. 59-60). The fact is the witness testified that he did not know what papers were in Appellant's file stating: "I do not recollect this petitioner as an individual, nor do I recall the particular file" (R. T. 52-53). The Court also sustained the objection to the following question (R. T. 69) "It is your understanding that the inquiry made of the F. B. I. was for the purpose of getting information regarding the organizations to which Appellant belonged. Is that not correct?"

A request for the production of the completed forms G-58 and G-59 relating to Appellant was denied after Mr. Grean, the U. S. Attorney, stated (R. T. 62):

"I am required by law, your Honor, to object to the revelation, in the event I should have them in the file, to any documents reported by the FBI to another organization of the Government in its official capacity. I would not be able to release such document were such a motion granted. These documents are privileged. They are such that were the court to order them I would of necessity respectfully refuse until such time as I was directed to release them by the Attorney General. Further, I would submit that such documents were requested before this court in a properly noticed motion for production of documents, the grounds of objection to such documents being required were stated to the court, and the court denied the motion for the production of the documents at that specific time."

A request for the production of blank forms G-58 and G-59 (R. T. 63) was likewise denied (R. T. 67) after extensive argument (R. T. 63-67). After the court refused to make an order for the production of forms G-58 and G-59 either in blank or completed Appellant served a subpoena duces tecum upon Albert Del Guercio, Acting District Director, requiring him to bring into court:

"1. Governmental forms G-58 and G-59 relating to and containing information relating to Eulogio de la Cruz secured in connection with his declaration of intention to become a citizen of the United States and his application for citizenship and bearing date in 1946 or 1947.

"2. Blank copies of governmental forms G-58 and G-59 employed in connection with applications for citizenship in 1946."

(C. T. 168.) The United States Attorney's motion to quash the subpoena duces tecum was granted (C. T. 172). It was error to thus deny Appellant access to the F. B. I. reports and forms. Fisher v. United States, No. 14731, decided by this Court February 15, 1956. In the Fisher case Appellant sought the production of the records of the F. B. I. to show the receipts prepared by the F. B. I. which were signed by the informer witness for himself and his wife for the moneys paid them by the F. B. I. from 1942 to 1953.

The informer witness claimed that the money he and his wife obtained totaling some $10,000 was for expenses only. Appellant sought to prove that part of the sum received was payment for services rendered. The Trial Court refused to grant appellant's request for the production of the receipts. This Court reversed saying:

"It is obvious that if Mores and his wife

were such extraordinarily devoted public servants their evidence would have a powerful affect on the jury . . .

"Since if Mores' testimony were true that would have proved the claimed patriotic character of the long service of Mr. and Mrs. Mores, one would expect the Government to have been glad to produce the receipts. Instead it resisted the motion and the court sustained its objection permitting only the admission of annual totals. Here the court committed substantial error."

In the Fisher case the F. B. I. reports would serve only to impeach the witness whereas in the instant case the F. B. I. reports would go to a material fact, namely, did the Government know the facts as to which it now claims deception. A fortiorari the denial of the F. B. I. reports in this case is substantial and reversible error.

At another stage in the proceeding Appellant sought to elicit from the witness Campos that prior to 1946, when Appellant first applied for naturalization and prior to February 26, 1947 when he filed his Petition for naturalization the witness Campos had informed the Government of Appellant's alleged membership in the Communist Party. After Campos had testified to having advised officials of

the United States Government that Appellant had been a member of the Communist Party Government objections to the following questions were sustained:

"Q. Did you tell any Government official about Mr. De La Cruz's membership in the Communist Party at any time before 1946?"
(R. T. 404.)

"Q. Did you tell this to any Government official at any time before February 26, 1947?"
(R. T. 405.)

"Q. Did you give this information to any employee of the Immigration and Naturalization Service at any time before February 26, 1947?"
(R. T. 405.)

If the Government knew all of the facts prior to the filing of petition on February 26, 1947 there was no deception and no basis for a denaturalization proceeding based on fraud (United States v. Anastasio, 226 F. 2d 912, 917).

In Minker v. United States, 350 U. S. 179 the Court observed that denaturalization "may result in 'loss of both property and life; or all that makes life worth living', Ng Fung Ho v. White, 259 U. S. 276, 284".

When such a precious right is on the block fullest scope should be given to cross examination especially in an

area as vital as appellee's knowledge of the facts as to which it claims it was deceived. Reilly v. Pinkus, 338 U.S. 260.

> "When we deal with citizenship we tread on sensitive ground. The citizenship of a naturalized person has the same dignity and status as the citizenship of those of us born here, save only for eligibility to the Presidency." Mr. Justice Douglas concurring in United States v. Minker, 350 U.S. 179, 197.

CONCLUSION

The Judgment of the District Court denaturalizing Appellant should be reversed.

Respectfully submitted,

BROCK, EASTON & FLEISHMAN

By: STANLEY FLEISHMAN

JOHN W. PORTER

ESTHER SHANDLER

Of Counsel

No. 14867.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EULOGIO DE LA CRUZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Jurisdiction of the Court.

Appellant brought action in the court below seeking to revoke and set aside appellant's naturalization [C. T. 2-13].[1] Jurisdiction was conferred upon the District Court by Section 338(a) of the Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. A., Sec. 738(a).

Since the judgment of the court below [C. T. 287-289] was a final decision, this court has jurisdiction of an appeal from that decision pursuant to Title 28, United States Code, Section 1291.

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[1]"C. T." refers to the Clerk's Transcript of Record. "R. T." refers to the Reporter's Transcript of Proceedings. References to Appellant's Opening Brief will be indicated by "Br."

Statement of the Case.

On June 5, 1952, appellee instituted action in the court below to revoke and set aside appellant's naturalization [C. T. 2-13] under the provisions of Section 338(a) of the Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. A., Sec. 738(a) [C. T. 2].

The complaint alleged, *inter alia,* that the appellant was naturalized on or about April 11, 1947 [Par. IV, C. T. 3]; that the appellant had been a member of the Communist Party of the United States during the years 1937, 1938, 1939 and 1940 [Par. VI, C. T. 4]; that the order admitting appellant to citizenship was procured upon the sworn statements of appellant "that during the preceding ten years he had been a member of the following organizations and no other: Cannery Workers Union, Ilocannisis Fraternity of America, Inc., and Filipino Community of the Los Angeles Harbor Area [Par. V, C. T. 3]; that this statement was false [Par. VI, C. T. 4]; that the granting of appellant's petition for naturalization and the issuance of the certificate of naturalization were fraudulently procured [Par. VII, C. T. 4].

Paragraph VII of the complaint further alleged that appellant "did conceal his membership in the Communist Party of the United States . . . to procure naturalization in violation of law." [C. T. 5.] Paragraph VIII alleged that the defendant "prevented the Immigration and Naturalization Service and the Court from determining whether or not his naturalization was prohibited by Section 305 of the Nationality Act of 1940 in that said defendant was a member of an organization which engaged in activities proscribed by that section." [C. T. 5.]

At trial, which commenced on November 30, 1954, the evidence for appellee consisted of the testimony of seven witnesses, and twenty-six exhibits.[2] Appellant, who did not personally appear in court at any stage of the trial, but who was represented by counsel, presented no witnesses. The only evidence on behalf of appellant is one exhibit [Ex. A]. In general, appellee presented evidence concerning (1) the proceedings which led to appellant's naturalization, including statements oral and written made by appellant during the course of these proceedings [R. T. 1-99]; (2) appellant's membership and activities in the Communist Party [R. T. 101-522]; and (3) the proscribed nature of the Communist Party as an organization under Section 305 of the Nationality Act of 1940 [R. T. 523-888]. No objection was raised by counsel for appellant that these categories of evidence, or either of them, were outside the scope of the issues.

During cross-examination of George B. Leckner, Preliminary Naturalization Examiner who acted upon appellant's petition for naturalization, appellant elicited that certain forms, relating to appellant, G-58 and G-59, may have been sent to the Federal Bureau of Investigation by the Immigration and Naturalization Service on or about October 26, 1946 [R. T. 50-51]. Appellant's efforts by motions [R. T. 62, 63, 76, 77] and subpoena [C. T. 168] to obtain these documents or blank copies thereof were denied [R. T. 62, 67, 77, 270; C. T. 172].

After trial had been concluded, the District Court filed its Findings of Fact and Conclusions of Law [C. T.

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[2]Twenty-eight exhibits were marked for identification, however only 26 were received in evidence, Exhibits 5 and 17 not being received.

278-286] and entered judgment revoking and setting aside the order admitting appellant to citizenship and cancelling his certificate of naturalization [R. T. 287-288]. The District Court concluded that appellant's naturalization was fraudulently [Conclusion of Law III, C. T. 284] and illegally [Conclusion of Law V, C. T. 285] procured.

Issues Presented.

1. Is there clear, convincing, and unequivocal evidence that appellant was a member of the Communist Party during 1937, or 1938, or 1939, or 1940?

2. Is there clear, convincing, and unequivocal evidence that the Communist Party, during the period of appellant's membership, was an organization proscribed by Section 305 of the Nationality Act of 1940?

3. Was the judgment of the District Court properly based upon illegal procurement as well as upon fraud?

4. Is there clear, convincing, and unequivocal evidence of appellant's intent to defraud?

5. Was appellant's personal knowledge of the proscribed nature of the Communist Party or his adherence to its views required to be proved, upon the record as presented, in order to support the judgment of the District Court?

6. Is appellant's naturalization by the United States District Court at Los Angeles, California on April 11, 1947, *res judicata,* so as to bar revocation of such naturalization?

7. Was appellant entitled to production of Forms G-58 and G-59, or blank copies thereof?

Statutes Involved.[3]

Section 338(a) of the Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. A., Sec. 738, provides:

> "Sec. 338. (a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured. * * *"

Section 305 of the Nationality Act of 1940, 54 Stat. 1141, 8 U. S. C. A., Sec. 705, provides in pertinent part:

> "Sec. 305. No person shall hereafter be naturalized as a cititzen of the United States—
>
> * * * * * * * *
>
> (b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates, or teaches—
>
> (1) the overthrow by force or violence of the Government of the United States or of all forms of law; or
>
> * * * * * * * *
>
> (c) Who writes, publishes, or causes to be written or published, or who knowingly circulates, distributes,

---

[3]These statutes were repealed by Section 403(a)(42) of the Immigration and Nationality Act, 66 Stat. 280.

prints. or displays, or knowingly causes to be circulated, distributed, printed, published, or displayed, or who knowingly has in his possession for the purpose of circulation, distribution, publication, or display any written or printed matter advising, advocating, or teaching opposition to all organized government, or advising, advocating, or teaching—

(1) the overthrow by force or violence of the Government of the United States or of all forms of law; or

* * * * * * * *

(d) Who is a member of or affiliated with any organization, association, society, or group that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision (c).

* * * * * * * *

The provisions of this section shall be applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization is, or has been, found to be within any of the clauses [classes] enumerated in this section, notwithstanding that at the time petition is filed he may not be included in such classes. * * *"

ARGUMENT.

I.

There Is Clear, Convincing and Unequivocal Evidence That Appellant Was a Member of the Communist Party During 1938 and 1939.

A. Summary of Testimony—Ignacio Ibalio Josue.

Witness Josue testified that he joined the Communist Party around the early part of 1938 [R. T. 103-104]; that he left the party around the latter part of 1939 or the early part of 1940 [R. T. 138, 278]; that he joined the cannery workers unit of the Communist Party at Seattle, Washington [R. T. 103]; that this unit was composed of members of the Communist Party who were also members of Cannery Workers Local No. 7; that this unit had about fifteen members [R. T. 103-104]; and that he recalled as being members in addition to himself; Aniceto Manzano, David De Leon, Eulogio De La Cruz (Appellant), Joe Prudencio, Cenon Campos, Ernesto Mangaoang, Al Fajardo, Dyke Miyagawa, and George Minato [R. T. 104-105].

That meetings of the unit were held at the apartment of one Lee Blue, who was unit organizer for the cannery workers unit of the Communist Party [R. T. 105]; that the meetings were held once a week during the fall of 1938 and the early part of 1939 [R. T. 108]; and that the meetings were "closed," that is, confined only to members of the Communist Party, except when it was predetermined that new members were to be inducted [R. T. 111-112].

That during the latter part of 1938 and the early part of 1939 various members of his unit of the Communist Party also held unscheduled meetings known as "fraction"

meetings [R. T. 114-118]; that a fraction meeting was a "meeting of members of the cannery workers unit of the Communist Party wherein they meet together to discuss policies which are to be presented to any particular meeting of a union . . ." [R. T. 115]; that these fraction meetings were open only to members of the Communist Party [R. T. 118, 275].

Witness Josue identified appellant from his picture on Plaintiff's Exhibit 6 (Certificate of Naturalization) [R. T. 123] and testified that during the years 1938, 1939 and probably 1940 he occupied the same room with appellant at the Waldon Hotel, Seattle, Washington [R. T. 121, 236-237]; that appellant was nicknamed "Bob" and was sometimes called Ah Wing Lee because of his Chinese features [R. T. 121-122]; that other members of the cannery worker's unit of the Communist Party named above also lived in the Waldon Hotel; Al Fajardo and Aniceto Manzano [R. T. 137].

That appellant was present at from 5 to 8 "closed" meetings of the Communist Party at the apartment of Lee Blue in 1938 and the early part of 1939 [R. T. 123, 124, 125]; that he and appellant attended meetings together [R. T. 127-128]; that appellant took part in the discussions of the meetings [R. T. 129]; that to assure that the meetings were closed, Lee Blue usually admitted the people who came in, and that if he was not admitting them, there usually was someone detailed to let them in and recognize them as they came in [R. T. 124, 279]; and that during the meetings the door was locked [R. T. 124].

That Communist Party literature was for sale and for distribution at the meetings held at Lee Blue's apart-

ment [R. T. 126-127, 213, 280]; that Plaintiff's Exhibits 7 ("The Communist Manifesto"), 8 ("The Constitution and By-Laws of the Communist Party of the United States of America") and 9 ("What is Communism") were among the literature on display at these meetings [R. T. 127].

That during 1938 or 1939, at their room at the Waldon Hotel, he saw appellant's Communist Party membership card or book; that he and appellant showed each other their cards [R. T. 130-131]; that he discussed Communist Party membership with appellant, discussing whether certain persons were "ripe" to be taken into the party [R. T. 131, 133]; and that appellant also attended three or four "fraction" meetings around the early part of 1939 [R. T. 133-134, 272].

B. Summary of Testimony—Cenon Campos.

Witness Campos testified that he joined the Communist Party in Seattle, Washington during 1936 [R. T. 292]; that he left the party during the latter part of 1939 [R. T. 304]; that he had a Communist Party membership book [R. T. 348-349] and that he paid dues to the Communist Party [R. T. 350].

That a cannery workers unit of the Communist Party was started sometime during 1938; that this unit held its meetings at Lee Blue's place and at the Arcade Building; that 15 to 20 persons were members of that group; and that he recalled as members in addition to himself: Minato, Mangaoang, Lee Blue, Espe, Carl Belos, Ignacio Josue, Ventura, Eulogio Cruz (appellant), Torres, Ancheta, De Leon, Manzano, Bautista, and Jose Prudencio [R. T. 293].

That he attended 6 or 7 Communist Party unit meetings at Lee Blue's apartment during the latter part of 1938 and the early part of 1939; that at these meetings he sometimes changed places with Lee Blue to guard the door in order to let in "no people but those who belonged to the party" [R. T. 294].

Witness Campos identified appellant from his picture on Plaintiff's Exhibit 6 (Certificate of Naturalization) [R. T. 304]. He testified that he first met appellant at the cannery workers unit of the Communist Party, although he had known him in 1937 [R. T. 296]; that appellant was also called Ah Wing Lee because of his Chinese features [R. T. 304].

That appellant was a member of the Communist Party [R. T. 296]; that he saw appellant at unit meetings at Lee Blue's apartment during 1938 and 1939 [R. T. 297]; that these meetings were restricted to members of the Communist Party [R. T. 298]; that appellant always participated in the discussions at these meetings [R. T. 303]; and that after attending his first meeting with appellant he verified the latter's membership in the Communist Party by asking whether he was "one of us" and appellant admitted that he was [R. T. 367].

That at the meetings at Lee Blue's apartment, literature was present for sale or for distribution; that this literature consisted of "Books that contained pictures of Lenin and Stalin, or that group, the Hammer and Sickle"; that Plaintiff's Exhibit 7 ("The Communist Manifesto") was among the literature [R. T. 300].

C. Summary of Testimony—Aniceto Manzano.

Witness Manzano testified that he joined the Communist Party around the fall or winter of 1938 [R. T. 444, 464]; that he left the party around 1939 [R. T. 464]; that he received a Communist party book [R. T. 454-457]; and that he paid dues to the Communist Party [R. T. 457-458, 517, 518].

That he joined the cannery workers unit of the Communist Party, which held its meetings at Lee Blue's apartment in Seattle, Washington [R. T. 445]; that "fraction" meetings of the unit were also held in the Arcade Building [R. T. 446, 462]; that he attended from six to eight meetings at Lee Blue's house around the late part of 1938 and the early part of 1939 [R. T. 447, 448]; that from 10 to 15 persons were in attendance at these meetings [R. T. 447]; that he recalled as being in attendance, in addition to himself: Al Fajardo, Josue, De La Cruz (appellant), Cenon Campos, Pete Batista, Joe Prudencio, Max Ava, David De Leon, Conrad Espe, and Lee Blue [R. T. 447]; and that the meetings were usually held once a week [R. T. 448].

Witness Manzano identified appellant from his picture on Plaintiff's Exhibit 6 (Certificate of Naturalization) [R. T. 460]; and testified that he (the witness) lived in the Waldon Hotel, where appellant, Al Fajardo and Ignacio Josue also lived [R. T. 453]; that appellant used to dine with him in his hotel room frequently [R. T. 454]; and that appellant was called Ah Wing Lee because of his Chinese look [R. T. 459].

That he saw appellant at from six to eight "closed" meetings of the Cannery Workers unit of the Communist Party during the latter part of 1938 and the early part

of 1939 [R. T. 451-452, 513]; that a closed meeting was a meeting "solely for the Communist Party members" [R. T. 449]; that "we have a guard at the door and check that every man that enters that apartment is a member of the Communist Party" [R. T. 449]; that appellant was also present at a fraction meeting at the Arcade Building [R. T. 462-463].

That at the meetings which he attended at Lee Blue's apartment, literature was for sale or for distribution [R. T. 460]; that the literature consisted of pamphlets "that have some pictures of this insignia of the Communist Party, sickle, or some pictures of the Communist leaders" [R. T. 461]; that he recognized Plaintiff's Exhibit 7 ("The Communist Manifesto") and 9 ("What is Communism") as being among the literature present at these meetings [R. T. 461].

That he paid dues to the Communist Party during the period of 1938 and 1939 at the rate of 10 cents per month, and that when he paid dues he was given a stamp which he pasted in his Communist Party book [R. T. 457-458]; that once around the late part of 1938 or the early part of 1939, he got behind in his dues and that appellant called upon him at the Waldon Hotel to collect his dues; that he paid appellant his Communist Party dues and received from appellant stamps for the dues that he paid [R. T. 458, 516, 518].

D. Clear, Convincing and Unequivocal Nature of the Testimony.

The uncontradicted testimony of three witnesses, former members of the Communist Party, identified appellant as having been a member of the Communist Party, as having attended both unit and "fraction" meetings of the

party during 1938 and 1939, which meetings were restricted solely to members of the party, as having had a Communist Party book which he showed to witness Josue [R. T. 130-131], as having discussed taking recruits into the Communist Party [R. T. 131, 133], as having admitted membership to witness Campos [R. T. 367], and as having collected Communist Party dues from witness Manzano, giving him stamps in return [R. T. 458, 516, 518].

Confronted with this testimony appellant remained silent.[4] He did not testify in his own behalf, nor did he offer any evidence to refute the evidence of his membership in the Communist Party. While in a civil proceeding an inference may be drawn from the failure of a party to produce evidence which it is within his power to produce (*Local 167 v. United States,* 291 U. S. 293, 298 (1934); *United States ex rel. Vajtauer v. Commissioner of Immigration,* 273 U. S. 103, 111-113 (1927); *Bilokumsky v. Tod,* 263 U. S. 149 (1923); *Kirby v. Tallmadge,* 160 U. S. 379, 382 (1896); *Hyun v. Landon,* 219 F. 2d 404, 409 (C. A. 9, 1955), affirmed 24 L. W. 3252; Wigmore on Evidence, 3d Ed., Vol. II, Secs. 285-289), resort need not be had to such inference in the case at bar. Without it, there is clear, convincing and unequivocal evidence of appellant's membership in the Communist Party.

Appellant's contention that the mere passage of time necessarily renders testimony unreliable (Br. 11), while

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[4]While appellant did not personally appear in court at any stage of the proceedings, he had the privilege of being present; but for reasons of his own, chose not to exercise this privilege [See, R. T. 9-10].

obviously incorrect as a rule of law, is here inapplicable as a permissible inference of fact. The relationship of witnesses Josue, Campos, and Manzano to appellant was such that the lapse of time here involved was not likely to dim their memories as to the *essential facts* concerning appellant's membership in the Communist Party. These witnesses were on intimate terms with appellant. Witness Josue lived in the same hotel room with him for about three years [R. T. 121, 236-237] and the two went to Communist Party meetings together [R. T. 127-128]. Witness Manzano also lived in the same hotel as appellant, and the latter frequently dined in Manzano's room [R. T. 453-454]. All three witnesses knew appellant by his nickname [R. T. 121-122, 304, 459]. These witnesses were not likely to soon forget their mutual acquaintance with appellant and their membership with him in the Communist Party. This is demonstrated by the fact that each witness was able to name a large proportion of the members of the cannery workers unit of the Communist Party [R. T. 104-105, 293, 447].

Appellant's contention that the testimony of the witnesses was unreliable because they themselves were subject to denaturalization and because they were former members of the Communist Party (Br. 12-13) is likewise without merit. The witnesses' liability to denaturalization is speculation, which it was improper to resolve in the District Court, since determining their liability to denaturalization along with that of the appellant, would have raised innumerable collateral issues. As to the witnesses' membership in the Communist Party, the court in *United States v. Politics,* 127 Fed. Supp. 768 (E. D. Mich., 1953), declared (p. 771):

> "After the above evidence was introduced, defendant made no denial but contents himself now,

through counsel, with questioning the reliability of testimony given by men who were formerly Communists. Our answer to that is, *'Where better can the government go but to those who have previously participated in the disloyalty?'* * * *" (Emphasis added.)

The language of *Bridges v. United States,* 199 F. 2d 811, 836 (C. A. 9, 1952), reversed on other grounds, 346 U. S. 209, concerning the evidentiary value of attendance at "closed" meetings of the Communist Party cannot be lifted out of context and applied to the case at bar. In the *Bridges* decision, Bridges himself, a labor union leader, took the stand and admitted attendance at Communist Party meetings and admitted that his union was offered and accepted aid from the Communist Party and its paper "The Daily Worker" (199 F. 2d 836-837). Such evidence of cooperation between Bridges' union and the Communist Party might well have explained Bridges' presence at meetings of the Communist Party, ordinarily closed, consistent with non-membership. In the case at bar, however, appellant gave no explanation of why he found himself at closed meetings of the Communist Party.

Appellant seems to contend that in order that his membership in the Communist Party may be established, it must be proved that he complied with all the formal requirements of membership as set forth in the Constitution of the Communist Party of the United States. The fallacy of this argument is two-fold. In the first place, it assumes that Congress, in proscribing membership in a designated organization, intended to be bound by all of the requirements such organization might see fit to lay down for membership. For example, Article III, Section 2 of the Constitution of the Communist Party of the

United States of America [Pltf. Ex. 8] provides that "A Party member is one who accepts the Party program. . . ." Yet, the Supreme Court in *Galvan v. Press,* 347 U. S. 522 (1954), citing with approval the earlier cases of *Kjar v. Doak,* 61 F. 2d 566 (C. C. A. 7, 1932) and *Greco v. Haff,* 63 F. 2d 863 (C. C. A. 9, 1933), made it clear that acceptance of the party program was not a prerequisite of membership within the intent of Congress.

In the second place, appellant's argument is erroneous in that it seeks to equate all of the requirements of membership with proof of membership. Of course, compliance with the requirements for membership as laid down by an organization would be evidence of membership, but certainly it was never intended that performance of each of such requirements to the letter had to be proved before membership could be established. *Fisher v. United States,* No. 14-731 ..... F. 2d ..... (not yet reported), decided by this court on February 15, 1956, does not so hold. That case merely required that the jury be given the "components of the term membership", rather than a dictionary definition, to aid it in its determination of whether the defendant was a member. The language of the court in the *Fisher* case is illuminating:

> *"Membership is composed of a desire on the part of the person in question to belong to an organization and acceptance by the organization.* Moreover certain actions are usually required such as paying dues, attending meetings and doing some of the work of the group. These were the factors mentioned in the Supreme Court's opinion in *Galvan v. Press,* 347 U. S. 522, 528-529 (1954) where the court considered whether the evidence justified the conclusion that a certain person was a member of the Communist Party.

> Congress in the Communist Control Act of 1954 indicates twelve types of evidence *which a jury may consider* to determine the question of membership. 50 U. S. C. §844. Analyzed carefully they break down into *acts of the individual indicating a desire to belong, acts of acceptance by the organization, and various contributions of funds or services to the organization.* * * *" (Emphasis added.)

In the instant case, enough "components" of membership were established to constitute clear, convincing and unequivocal evidence of "a desire on the part" of appellant "to belong to" the Communist Party and an "acceptance by" the party.

II.

There Is Clear, Convincing and Unequivocal Evidence That the Communist Party, During the Period of Appellant's Membership, Was an Organization Proscribed by Section 305 of the Nationality Act of 1940.

Section 305 of the Nationality Act of 1940, which was in effect at the time appellant was naturalized on April 11, 1947, prohibited the naturalization of any person who had, within ten years prior to filing his petition for naturalization, been a member of an organization that "believes in, advises, advocates, or teaches . . . the overthrow by force or violence of the Government of the United States". This section also prohibited the naturalization of any person who had, within ten years prior to filing his petition for naturalization, been a member of an organization that "writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publi-

cation, issue, or display, any written or printed matter" advising, advocating, or teaching the overthrow by force or violence of the Government of the United States. The record contains clear, convincing and unequivocal evidence that the Communist Party of the United States, during 1938 and 1939 fell within the proscription of Section 305. Two witnesses testified concerning the proscribed nature of the Communist Party.

A. Summary of Testimony—William Ward Kimple.

Witness Kimple, a retired police officer [R. T. 523], testified that he joined the Communist Party in Los Angeles, California, during 1928 as a part of his official duties as a police officer and that he remained in the party in this capacity until the fall of 1939 [R. T. 524]; that while a member of the party he held the positions of unit literature agent, unit educational director, unit organizer, assistant to the Los Angeles County membership director, and alternate on the disciplinary committee [R. T. 525]; that as educational director in the unit, he would lead discussions in the unit and also organize the sale of literature [R. T. 527]; and that his duties as literature agent entailed the sale and distribution of Communist Party literature, newspapers, periodicals, books, and pamphlets [R. T. 527].

That during his membership in the Communist Party he came in contact with other Communist Party functionaries and had discussions with them concerning the Communist Party [R. T. 526]; that he attended Communist schools, classes and educational lectures practically every year that he was in the Communist Party [R. T. 526]; that he attended classes during 1937 and 1938 held in homes in the Hollywood area; that some of these classes were taught by Doug Jacobs, Comrade Levin, Lyons, Frank Specter,

and Rose Bush, functionaries in the Communist Party [R. T. 529]; that from the functionaries with whom he came in contact, and from whom he took classes, he learned the aims and purposes of the Communist Party [R. T. 529-530].

That he was taught that the aims of the Communist Party were for the overthrow of the existing capitalist state and the forming of a communist state by the use of force and violence [R. T. 532]; that, in the words of the witness:

> "We were taught in the Communist Party that the capitalist state would never relinquish its possession of the state, and the means of production, without the use of force; *and that it would be necessary for the Communist Party to use force in taking the state from the capitalists.*" (Emphasis added.)

Witness Kimple identified plaintiff's exhibits 7 through 21 and 23 through 28 as official publications of the Communist Party and as having been sold, or distributed, or used by the party [R. T. 547-593].

B. Summary of Testimony—Nathaniel Honig.

Witness Honig testified that he joined the Communist Party in 1927 and remained a member until September, 1939 [R. T. 744]; that from 1927 to March, 1930 he was a member of the staff of the Daily Worker in New York, "the official publication of the Communist Party of the United States" [R. T. 744]; that from March, 1930 to May, 1934, he was editor of the Labor Unity as part of his official duties in the Communist Party [R. T. 745, 746]; that from May, 1934 to September, 1935 he was representative of the American Communist Party to the Red Communist International labor union in Moscow, Russia [R. T. 746]; that he was sent to Russia as a

representative by the Central Committee of the Communist Party of the United States [R. T. 747], and that he received his instructions from Jack Stachel, who was a member of the Political Bureau of the Communist Party, from Earl Browder, who was the secretary of the Communist Party, and from a representative of the Communist International in the United States at that time [R. T. 748-749]; that from his return to the United States until April, 1946 he was a functionary in the district headquarters of the New York district of the Communist Party [R. T. 746]; that from April, 1936 to September, 1937, he was labor editor of the Western Worker in San Francisco [R. T. 746], "which was the official organ of the Communist Party of California", being succeeded by the People's World [R. T. 752]; that from September, 1937 to September, 1939, in Seattle, Washington, he was a member of the District Executive Committee of the Communist Party in the northwest district, and became educational director of the Communist Party there [R. T. 746-747]; that as educational director he also taught classes in workers' schools in Seattle [R. T. 753]; that prior to his trip to Moscow he had taught Communist Party schools in New York [R. T. 758]; that on his return from Russia in 1935, which took 40 days, he was accompanied by William Z. Foster, who was head of the Communist Party in the United States; that during this trip he had discussions with Foster, whom he knew personally, concerning Communist Party activities and the aims and purposes of the Communist Party [R. T. 755-757]; that the aims of the Communist Party during 1938 and 1939 were in the language of the witness [R. T. 759-760]:

> "The Witness: The first aim of the Communist Party at that period was—it was called its ultimate aim by the party—*to establish a Soviet America* by

peaceful means, if possible, *but if not possible by the use of force;* and, the second aim of the Communist Party of the United States in this period was to *agitate, stir up the masses of the American people,* particularly those who were members of trade unions and those who were working in industry, plants, factories, *to the extent that they would become discontented with the existing system in the United States* of the governmental system in the United States; and this was to be done by means of strikes, by recruiting of these people to the Communist Party, by various methods of propaganda. The third aim of the Communist Party of the United States at that period—I am just giving them in order of the importance—I am just giving the major aims—the third aim, then, was by various practical maneuvers to bring about, first, stirring up the masses of people; and then, of course, through that establishing the Soviet America." (Emphasis added.)

That his duties as educational director in Seattle were to be in charge of propaganda issued by the Communist Party of the Northwest district; and to draw up outlines for courses and classes to be given in the workers school of the Communist Party in the Seattle district, and that in the performance of those duties he came in contact with the literature and material to be used in the teaching in those schools [R. T. 764]. Witness Honig identified plaintiff's exhibits 7 through 8, 10 through 12, 14 through 16, and 18 through 27 [R. T. 766, 768] as documents published by publishing firms which were part of the Communist Party, as in circulation in the Communist Party, obtainable in Communist Party bookstores, as being sold and distributed in Communist Party units, and as being used by him in drawing up outlines for the workers' school classes [R. T. 767-768, 769].

C. Clear and Convincing Nature of Testimony.

The evidence discussed above constitutes clear, convincing, and unequivocal evidence that during 1938 and 1939 the Communist Party of the United States believed in and advocated the overthrow by force or violence of the Government of the United States, as well as circulated literature advocating such overthrow. The latter proposition is supported by the literature itself [Pltf. Exs. 7-28]. Since the record contains excerpts from these exhibits [C. T. 190-201; R. T. 556-557; 565, 566-567, 573-574, 583-585, 589-590, 591-592, 594-597, 598, 604-608], none will be included in this brief. The opinion of Judge Yankwich in *United States v. Title,* 132 Fed. Supp. 185 (S. D. Cal., 1955) contains an exhaustive discussion of the literature of the Communist Party, including some of the exhibits in the present case.

Schneiderman v. United States, 320 U. S. 269 (1943), dealt with the aims and purposes of the Communist Party in 1927, and cannot control the case at bar. Were the *Schneiderman* case to be again decided today, the Supreme Court would undoubtedly do so in the light of Congressional findings [Sec. 1 of the Internal Security Act of 1950, 66 Stat. 987]; its own more recent pronouncements (*Galvan v. Press,* 347 U. S. 522 (1954); *Harisiades v. Shaughnessy,* 342 U. S. 580 (1952); *Carlson v. Landon,* 342 U. S. 524 (1952)); and the latest judicial findings of inferior tribunals in denaturalization cases (*Sweet v. United States,* 211 F. 2d 118 (C. A. 6, 1954), cert. den. 348 U. S. 817; *United States v. Polites,* 127 Fed. Supp. 768 (E. D. Mich., 1953); *United States v. Chruszczak,* 127 Fed. Supp. 743 (W. D. Ohio, 1954); *United States v. Title, supra.*)

III.

The Judgment of the District Court Was Properly Based Upon Illegal Procurement as Well as Upon Fraud.

At this point appellee deems it appropriate to note that the District Court revoked appellant's naturalization, not only upon the ground of fraud, but also upon the ground that such naturalization was illegally procured [see Conclusion of Law V, C. T. 285]. Illegal procurement as a ground for denaturalization was specifically authorized by Section 338(a) of the Nationality Act of 1940,[5] and while the Immigration and Nationality Act of 1952 omits this ground for denaturalization,[6] the present action having been filed on June 5, 1952, before the repeal of the 1940 Act,[7] was preserved by the savings clause contained in the 1952 Act.[8]

As previously mentioned in Point II above, Section 305 of the Nationality Act of 1940 prohibited the naturalization of an alien who within ten years immediately preceding the filing of his petition for naturalization had been a member of an organization described therein. Since it was

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[5]Section 338(a): ". . . on the ground of fraud *or on the ground that such order and certificate of naturalization were illegally procured.*" (Emphasis added.)

[6]See, Section 340(a) of the Immigration and Nationality Act of 1952, 66 Stat. 260, 8 U. S. C. A., Sec. 1451(a).

[7]The Nationality Act of 1940 (Act of Oct. 14, 1940) was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, 66 Stat. 280, effective December 24, 1952 (See, Sec. 407 of the Immigration and Nationality Act, 66 Stat. 281).

[8]Section 405(a) of the Immigration and Nationality Act, 66 Stat. 280, 8 U. S. C. A., note following Section 1101, provides in pertinent part: "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed . . . to affect any prosecution, suit, action, or proceedings, civil or criminal, brought . . . at the time this Act shall take effect. . . ."

established that appellant was a member of the Communist Party during 1938 and 1939, and that the Communist Party during these years engaged in activities proscribed by Section 305, the evidence discussed in Points I and II above alone, is sufficient to support the judgment of the District Court on the ground of illegal procurement, irrespective of the elements of fraud.

Appellant urges that "'illegal procurement' was not pleaded nor was it within the issues framed by the pretrial order", relying upon *Schneiderman v. United States,* 320 U. S. 118, 160 (1943) (Br. 25). While the *Schneiderman* decision would seem to support appellant's position, "each case should be allowed to stand upon its own bottom" (*Mar Gong v. Brownell,* 209 F. 2d 448, 453 (C. A. 9, 1954)). Counsel for appellee does not have available for reference all of the allegations made in the *Schneiderman* complaint; however, the complaint in the case at bar, although based primarily upon fraud, would seem to contain sufficient allegations to inform the appellant of the charge of illegal procurement. Appellant's membership in the Communist Party during 1937, 1938, 1939, and 1940 is specifically alleged in the complaint [Par. VI, C. T. 4]. Paragraph VII alleges that appellant "did conceal his membership in the Communist Party . . . *to procure naturalization in violation of law*" (Emphasis added) [C. T. 5]. Paragraph VIII alleges that the defendant "prevented the Immigration and Naturalization Service and the Court from determining whether or not his naturalization was prohibited by Section 305 of the Nationality Act of 1940 *in that said defendant was a member of an organization which engaged in activities proscribed by that section*" (Emphasis added) [C. T. 5]. These allegations, it is submitted, gave appellant notice of the fact that the

government was proceeding upon the charge of illegal procurement as well as upon fraud.

Nor can it be said that illegal procurement was not within the issues of the case. Both the pleadings [C. T. 4, 16] and the Pre-Trial Order [C. T. 57] place appellant's membership in the Communist Party during 1937, 1938, 1939 and 1940, in issue; and while the proscribed nature of the Communist Party was not specifically mentioned in the Pre-Trial Order, both court and counsel undoubtedly regarded it as an issue, since 365 pages of testimony [R. T. 523-888] and 22 exhibits were devoted to the point. These exhibits were shown to appellant before trial [R. T. 4], and counsel for appellant during the course of the trial referred to the proscribed nature of the Communist Party as "one of the ultimate issues to be determined in the case" [R. T. 535-536].

It is submitted therefore that the Court below properly revoked appellant's naturalization upon the ground of illegal procurement as well as fraud.

IV.

There Is Clear, Convincing and Unequivocal Evidence of Appellant's Intent to Defraud.

The gist of appellant's fraud is that he intentionally concealed the fact that he had been a member of the Communist Party of the United States, thereby inducing the naturalization examiners, without further investigation of his qualifications for citizenship, to make an unconditional recommendation to the court that his petition for naturalization be granted. Where such fraud is practiced, citizenship may be revoked (*Knauer v. United States,* 328 U. S. 654 (1946); *Johannessen v. United States,* 225 U. S. 227 (1912); *Luria v. United States,* 231 U. S. 9 (1913);

Corrado v. United States, 227 F. 2d 780 (C. A. 6, 1955); *Sweet v. United States,* 211 F. 2d 118 (C. A. 6, 1954), cert. den. 348 U. S. 817, affirming the following District Court cases: *United States v. Charnowola,* 109 Fed. Supp. 810 (E. D. Mich., 1953); *United States v. Sweet,* 106 Fed. Supp. 625 (E. D. Mich., 1952), and *United States v. Chomiak,* 108 Fed. Supp. 527 (E. D. Mich., 1952)).

The first step in appellant's concealment commenced on August 30, 1946, when he "filled out and signed an Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization, Form N-400, together with information sheet attached thereto [Ex. 1], which was filed with the Los Angeles District Office of the United States Immigration and Naturalization Service on or about November 4, 1946" [see, Pre-Trial Order, where these facts are admitted—C. T. 56]. On the reverse side of the information sheet attached to Exhibit 1, above appellant's signature, appears the following:

> "The following is a complete list of *all* the organizations of every kind and description which I am now a member of or affiliated with, and which I have been member of or affiliated with during the last ten (10) years, together with the dates or approximate dates marking the periods of my membership or affiliation:
>
> | Name of Organization | Address of Organization | From | To |
> |---|---|---|---|
> | Cannery Worker Union | Seattle, Wash. | 1937 | 1946 |
> | Ilocannisis Fraternity of America Inc. | San Pedro, Cal. | 1939 | 1946 |
> | Filipino Community of the L. A. Harbor Area | Long Beach, Cal. | 1945 | 1946 |
>
> Date Aug. 30, 1946
>
> /s/ Eulogio dela Cruz
> Signature of Applicant"

Thus, appellant in his own handwriting listed the Cannery Workers Union, Seattle, Washington, of which he had been a member from 1937 to 1946, but did not list the Communist Party of which he had been a member at the same place during 1938 and 1939. This indicates that appellant in filling out this form intended to conceal his Communist Party membership, since he was required to give *"all* the organizations of every kind and description . . ." As to the information sheet attached to Exhibit 1, there can be no complaint that "memory of events long past become clouded" (Br. 19-20), since a written memorial bearing appellant's own handwriting and signature remains as mute evidence to condemn him.

The second step in the process of concealment occurred on February 26, 1947, when appellant appeared before Preliminary Examiner George B. Leckner and testified under oath [R. T. 23] that the list of organizations appearing on the information sheet quoted above were the only "clubs, societies or organizations that he had been connected with or affiliated with in any way, shape, form, in the past 10 years" [R. T. 27]. The third step occurred when appellant reiterated under oath [R. T. 81] this false information to Designated Examiner Ernest G. Woodward [R. T. 82], whose duty it was to review Leckner's work to see that he hadn't missed anything, by reexamination of the petitioner and his witnesses [R. T. 81].

The testimony of examiners Leckner and Woodward was not, as appellant contends (Br. 19), based exclusively upon their "invariable practice". The witnesses' signatures, check marks, initials, and numbers in their own handwriting, constitute evidence of past recollection recorded (see, Wigmore on Evidence, 3d Ed., Vol. III, Secs. 734-755), which combined with their invariable practice or custom (see, Wigmore on Evidence, 3d Ed., Vol. I, Secs. 92-98)

to render the fact that the questions were asked and the answers given almost a mathematical certainty. The testimony of naturalization examiners, even though they have no independent recollection of the petitioner, has been held to constitute clear, convincing and unequivocal evidence justifying revocation of naturalization (*Corrado v. United States,* 227 F. 2d 780, 782 (C. A. 6, 1955), affirming *United States v. Corrado,* 121 Fed. Supp. 75, 78-79 (E. D. Mich., 1953)). In *Cufari v. United States,* 217 F. 2d 404 (C. A. 6, 1955), upon which appellant lies, *the naturalization examiners were deceased,* and others sought to identify their notations and testify as to the invariable practice of the deceased examiners.

Exhibit 2 ("Continuation Sheet—RESULT OF EXAMINATION") is weighty evidence that appellant was asked concerning the list of organizations which he had furnished and that he had affirmed the correctness of the information contained on the reverse side of information sheet attached to Exhibit 1. Exhibit 2 was prepared by examiner Leckner at the time of his examination of appellant [R. T. 25], and as its title indicates was used to show the results of such examination. Leckner testified that he always asked petitioners for naturalization "what clubs, societies or organizations they had been connected or affiliated with in any way, shape, form, in the past 10 years" [R. T. 27]; and his initials [R. T. 28] appearing in the column "Clear" after item 15 on Exhibit 2, "List Organizations" shows that he did so in the case of appellant.

Examiner Woodward used red ink to identify it as his own and to show that he had reviewed the examination by the preliminary examiner and had "questioned the petitioner and the witnesses" [R. T. 80]. He testified that it

was his invariable practice to "ask every petitioner appearing before me if this list constituted all of the organizations, societies and clubs to which he had belonged the last ten years prior to the time of his appearance before me" [R. T. 82]. The fact that he did so in the case of appellant is shown by his check mark in red across Leckner's initials in the column "Clear", following Item 15 of Exhibit 2, "List Organizations", and by his signature in red on Exhibit 2. Woodward testified that a check mark indicated that he had reviewed Leckner's work by re-examination of both the witnesses and the petitioner [R. T. 80-81].

Both examiners recommended that appellant's petition for citizenship be granted [R. T. 33, 85; Ex. 4]; and neither would have made such recommendation had he learned or had reason to believe that appellant had been a member of the Communist Party. Instead they would have put a hold on the case for further investigation [R. T. 29-30, 33-34, 85]. Both naturalization examiners were aware on February 26, 1947 of the duty imposed upon them by 8 C. F. R. 352.3 to investigate the petitioner and his witnesses to determine whether the petitioner had been a member of an organization proscribed by Section 305 of the Nationality Act of 1940 [R. T. 32, 84]; and there is a presumption that they performed this duty (*United States v. Chemical Foundation,* 272 U. S. 1, 14-15 (1926); *Pasadena Research Laboratories v. United States,* 169 F. 2d 375, 381-382 (C. A. 9, 1948), cert. den. 335 U. S. 853). The testimony of the examiners and the notations made by them supports this presumption.

Appellant was fully aware that he had been a member of the Communist Party during 1938 and 1939. Having attended "closed" meetings where Communist Party lit-

erature was present, having received a membership book, having discussed with another member whether certain persons were "ripe" for membership, having admitted membership to one of plaintiff's witnesses, and having collected dues from a fellow member, appellant's suggestion that he "may have felt" that he was never a member (Br. 22) merits no consideration. Nor does his speculation that it was "entirely possible" that appellant believed that the Communist Party should not be listed (Br. 23); since the information sheet called for *"all* the organizations of every kind and description", and since the naturalization examiners asked questions to the same effect [R. T. 27, 82]. Appellant's failure to disclose his membership, under these circumstances, is weighty evidence of his intent to defraud.

Thus, there is clear, convincing and unequivocal evidence of appellant's intent to defraud (*Baumgartner v. United States,* 320 U. S. 665; *Schneiderman v. United States,* 320 U. S. 118 (1943)). In the *Baumgartner* and *Schneiderman* cases the defendants took the stand and explained away the allegedly incriminating statements, whereas in the case at bar the appellant did not. Even in criminal cases it has been held that

> . . . where the party having the burden makes a probable case on an issue as to which the accused has peculiar knowledge of the facts and may easily prove them and the prosecution cannot, an inference arises that the truth is with the prosecution. (*Williams v. United States,* 170 F. 2d 319, 322 (C. A. 5)).

And as Justice Clark pointed out in *Holland v. United States,* 348 U. S. 121 (1954), also a criminal case (pp. 138-139): "Once the Government has established its case, the defendant remains quiet at his peril."

V.

Neither Appellant's Personal Knowledge of the Proscribed Nature of the Communist Party nor His Adherence to Its Views Was Required to Be Proved, Upon the Record as Presented, in Order to Support the Judgment of the District Court.

A. Illegal Procurement.

"Illegal procurement" as a basis for denaturalization is predicated upon the theory that the statutory requirements for naturalization have not been complied with—that naturalization is prohibited by the then existing law. It is well settled that where naturalization has been obtained despite a statutory prohibition, it may be revoked (*United States v. Ginsberg,* 243 U. S. 472 (1917); *United States v. Ness,* 245 U. S. 319 (1917); *Maney v. United States,* 278 U. S. 17 (1928); *United States v. Chomiak,* 108 Fed. Supp. 527 (E. D. Mich., 1952), affirmed *sub nom. Sweet v. United States,* 211 F. 2d 118 (C. A. 6, 1954), cert. den. 348 U. S. 817; *United States v. Polites,* 127 Fed. Supp. 768 (E. D. Mich., 1953)).

In *United States v. Ginsberg, supra,* which has never been overruled, this theory was carried to its ultimate extreme. In that case Ginsberg had been admitted to citizenship in the judge's chambers despite the statutory injunction that the naturalization hearing must take place in open court. The Supreme Court concluded that by reason of this fact his naturalization had been illegally procured and directed its revocation. In doing so, it declared (p. 475):

> *"No alien has the slightest right to naturalization unless all statutory requirements are complied with;* and every certificate of citizenship must be treated as granted upon condition that the Government may

challenge it as provided in §15 and demand its cancellation unless issued in accordance with such requirements. *If procured when prescribed qualifications have no existence in fact it is illegally procured;* a manifest mistake by the judge cannot supply these nor render their existence non-essential. * * *" (Emphasis added.)

Similarly, if appellant was naturalized at a time when his naturalization was prohibited by Section 305 of the Nationality Act of 1940, "it was illegally procured." It was not necessary to prove that appellant knew the aims and purposes of the Communist Party, or subscribed to them. It was only necessary to prove that (1) appellant was a member of the Communist Party within ten years immediately preceding the filing of his petition for naturalization, and (2) that the Communist Party, during the period of appellant's membership therein was an organization proscribed by Section 305. As the Court said in *United States v. Polites, supra,* at page 770:

> "It then only becomes necessary for plaintiff to prove that the Communist Party of the U. S. at the time defendant was a member, did advise, advocate or teach overthrow of this government by force or violence. *It is not necessary to prove that defendant had knowledge of the objectives of the Communist Party of the U. S.* If he was a member of that party, within the statutory ten year period, which he admits, and it develops that such organization was then advising, advocating or teaching forcible or violent overthrow of this government, he was not then eligible for citizenship, the prohibition being jurisdictional." (Emphasis added.)

And as the Court pointed out in *United States v. Chomiak, supra,* at page 528:

> "The defendant herein procured naturalization *when the prescribed qualification of nonmembership in a cetrain type of organization did not exist in fact,* and his naturalization was therefore illegally procured. and must therefore be ordered revoked. 8 U. S. C. A. §738(a). . . ." (Emphasis added.)

Appellant's reliance upon *Wieman v. Updegraff,* 344 U. S. 183 (1952), is misplaced. The *Updegraff* decision involved the power of a state to bar persons from its employment on the basis of innocent membership, while the present case involves the right of an alien to naturalization when he does not meet the statutory requirements. As the Supreme Court pointed out in *United States v. Ginsberg, supra:* "No alien has the slightest right to naturalization unless all the statutory requirements are complied with" (245 U. S. at p. 475). Ginsberg was innocent, the mistake having been made by the judge, yet his naturalization was revoked.

Appellant's "innocence" in the instant case, however, must be evaluated in the language of the Supreme Court in *Harisiades v. Shaughnessy,* 342 U. S. 580 (1952), at page 593:

> "During all the years since 1920 Congress has maintained a standing admonition to aliens, on pain of deportation, not to become members of any organization that advocates overthrow of the United States Government by force and violence, *a category repeatedly held to include the Communist Party.*" (Emphasis added.)

B. Fraud.

Appellant's fraud, as found by the District Court, consisted in essence of his concealment of his membership in the Communist Party [R. T. 278-286]. The materiality of such concealment lies in the fact that it prevented a full and proper investigation of his qualifications for citizenship. To support the judgment of the court below on the ground of fraud, therefore, the record need not show that appellant was aware of or subscribed to the aims and purposes of the Communist Party, or even show that the Communist Party was an organization proscribed by Section 305 of the Nationality Act of 1940; although the record amply establishes the latter point. The record need only show that further investigation was prevented. (*Corrado v. United States,* 227 F. 2d 780, 784 (C. A. 6, 1955); affirming *United States v. Corrado,* 121 Fed. Supp. 75, 78 (E. D. Mich., 1953); *United States v. Genovese,* 133 Fed. Supp. 820 (D. N. J, 1955); *United States v. Accardo,* 113 Fed. Supp. 783 (D. N. J., 1953), affirmed 208 F. 2d 632, cert. den. 347 U. S. 952; *United States v. Marcus,* 1 Fed. Supp. 29 (D. N. D., 1932); *cf. Del Guercio v. Pupko,* 160 F. 2d 799 (C. A. 9, 1947)).

As the court declared in *Corrado v. United States, supra* (p 784):

> "Upon analysis, *the issue is not whether naturalization would have been denied appellant had he revealed his numerous arrests, but whether, by his false answers, the Government was denied the opportunity of investigating the moral character of appellant and the facts relating to his eligibility for citizenship.* How could any Government official or witness say whether or not citizenship would have been

denied appellant from an investigation of the various causes of his arrest, when no opportunity for investigation was afforded? His false statement upon the material matter in actuality caused no investigation to be made. * * *" (Emphasis added.)

Thus, appellant's contention that materiality requires concealment of a fact which had it been known would have disqualified him for citizenship (Br. 35), while here unimportant in view of the convincing evidence of the proscribed nature of the Communist Party, is unsound. The inapplicability of *United States v. Kessler,* 213 F. 2d 53, upon which appellant relies, to the instant case was explained in *Corrado v. United States, supra* (p. 783).

VI.

The Appellant's Naturalization by the United States District Court at Los Angeles, California, on April 11, 1947 Is Not Res Judicata so as to Bar Revocation of Such Naturalization.

Revocation of naturalization has been a part of our law since the Act of June 29, 1906, 54 Stat. 596, 601. It was reenacted as Section 338(a) of the Nationality Act of 1940, 54 Stat. 1158, 8 U. S. C. A., Sec. 738(a); and appears again in the present law as Section 340 of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. C. A., Sec. 1451. Numerous decisions of the Supreme Court, as well as other courts, have upheld decrees revoking naturalization, and the Supreme Court in denying certiorari in *Sweet v. United States,* 211 F. 2d 118 (C. A. 6, 1954), cert. den. 348 U. S. 817, has upheld three such decrees as recently as October 14, 1954. Considering this background, appellant's contention that the

judgment of the naturalization court, admitting him to cititzenship, is *res judicata* merits little attention (*Knauer v. United States,* 278 U. S. 17, 23 (1928); *United States v. Ness,* 245 U. S. 319, 325-327 (1917); *Maney v. United States,* 287 U. S. 17, 23 (1928); *United States v. Ginsberg,* 243 U. S. 472, 475 (1917); *Johannessen v. United States,* 225 U. S. 227, 238 (1912); *United States v. Bridges,* 123 Fed. Supp. 705 (N. D. Calif., 1954); *United States v. Holtz,* 54 Fed. Supp. 63, affirmed 162 F. 2d 716, cert. den. 322 U. S. 837; *United States v. Unger,* 26 F. 2d 114, 116 (S. D. N. Y., 1928)).

In *Maney v. United States,* 278 U. S. 17 (1928), a decree of the District Court admitting an applicant to citizenship was held not to be *res judicata* as against a subsequent revocation proceeding, even though the United States had objected to naturalization before the naturalization court. The *Maney* case was decided after *Tutun v. United States,* 270 U. S. 568, holding judgments of naturalization to be appealable.

The dicta in *Knauer v. United States,* 328 U. S. 654, 670 (Br. 38), wherein the Supreme Court declined to decide a matter which was not before it, cannot be deemed to overrule its long line of prior decisions holding that decrees of naturalization are not *res judicata,* so as to prevent revocation, either for fraud or for illegality. As far as revocation of naturalization is concerned, there is no distinction between intrinsic or extrinsic fraud (*United States v. Siegel,* 152 F. 2d 614, 615 (C. C. A. 2, 1945), cert. den. 328 U. S. 868).

VII.

Appellant Was Not Entitled to Production of Forms G-58 and G-59, or Blank Copies Thereof.

During cross-examination of Preliminary Examiner Leckner, appellant elicited testimony that certain forms, relating to appellant, G-58 and G-59 were sent to the Federal Bureau of Investigation by the Immigration and Naturalization Service on or about October 26, 1946 [R. T. 50-51]. Appellant now complains that the refusal of the District Court to order production of these forms and/or blank copies thereof wrongfully denied him the opportunity of showing that the "government" was not deceived. He urges that "if for example prior to February 26, 1947, the date of filing of the Petition for Naturalization, the Government knew that appellant was a member of the Communist Party in the years 1938 and 1939 but nevertheless decided to recommend citizenship it may not now seek to revoke citizenship for that membership" relying upon *United States v. Anastasio,* 226 F. 2d 912 (C. A. 3, 1955), (Br. 38-39).[9]

At the outset. it should be noted that it is immaterial to the issue here involved what other agencies of the government, or even the Immigration and Naturalization Service, may have known at the time appellant filed his petition for naturalization. It was the *naturalization examiners* who relied upon appellant's false statements and recommended that his petition be granted [R. T. 33, 85; Ex. 4] and it was their reliance alone which led

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[9]It should be noted that a petition for certiorari was filed in the *Anastasio* case raising two questions, one of which is as follows (24 L. W. 3273): "(1) Does naturalization examiner's recommendation, with knowledge of alien's fraud, that alien be admitted to citizenship, preclude subsequent denaturalization suit."

to appellant's naturalization without further investigation. The fallacy of imputing to officials of the government charged with performing a particular function, information which may be found in government files, even of the same agency, has been judicially exposed (*Kiefer v. United States,* 228 F. 2d 448 (C. A. Dist. Col., 1955), cert. den. 24 L. W. 3183; *Clohesy v. United States,* 199 F. 2d 475 (C. A. 7, 1952)).

Both naturalization examiners testified, in effect, that at the time they examined appellant and recommended that his petition be granted, they had no knowledge of his membership in the Communist Party; that had they had any knowledge of such membership, they would not have recommended that his petition be granted, but would have marked the case "hold" for further investigation [R. T. 29-30, 33-34, 85]. Designated Examiner Woodward testified that had there been any F. B. I. reports in the file he would have read them [R. T. 915]. This testimony is sufficient to establish reliance.

Appellant's request for the production of forms G-58 and G-59, therefore, must be appraised from the standpoint of impeachment; since, even if these forms could have been located, and even if they contained all of the information that appellant hoped that they would contain; and even if appellant could have shown that the forms had been returned to the Immigration and Naturalization Service prior to February 26, 1947, and had been placed in the file of appellant prior to the latter date; the only effect of such evidence would be to impeach the testimony of Examiners Leckner and Woodward.

In order to require the production of documents in the files of the government for the purposes of impeach-

ment, sufficient foundation must be laid during the course of cross-examination. A comparison of the Supreme Court cases of *Goldman v. United States,* 316 U. S. 129 (1942), and *Gordon v. United States* 344 U. S. 414 (1953), illustrates this rule. In the *Goldman* case the defendants demanded that they be permitted to inspect the notes and memoranda made by federal agents, the agents having admitted that they refreshed their recollection from these papers prior to testifying. The Supreme Court held that there was no error in denying the inspection of the witnesses' memoranda, because (p. 132):

> "We think it the better rule that where a witness does not use his notes or memoranda in court, *a party has no absolute right to have them produced and to inspect them.* Where, as here, they are not only the witness' notes *but are also part of the Government's files, a large discretion must be allowed the trial judge.* We are unwilling to hold that the discretion was abused in this case." (Emphasis added.)

In the *Gordon* case, the Supreme Court ruled that production should have been ordered; however, in so doing, the court indicated the type of foundation which must be laid before production becomes a matter of right (pp. 418-419):

> "By proper cross-examination, defense counsel laid a foundation for his demand by showing that the *documents were in existence, were in possession of the Government,* were made by the Government's witness under examination, were *contradictory of his present testimony,* and that the contradiction was as to relevant, important and material matter which

> directly bore on the main issue being tried: the participation of the accused in the crime. The demand was for production of these specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government *on the chance that something impeaching might turn up.* Nor was this a demand for statements taken from persons or informants not offered as witnesses. The Government did not assert any privilege for the documents on grounds of national security, confidential character, public interest, or otherwise." (Emphasis added.)

In a footnote to the above quotation the Supreme Court distinguished the *Goldman* case in the following language:

> "In Goldman v. United States, 316 U. S. 129, the notes sought to be inspected had neither been used in court, *nor was there any proof that they would show prior inconsistent statements.*" (Emphasis added.)

In the case at bar, appellant did not show that completed forms G-58 and G-59 were in possession of the government at the time of trial; nor did he show that these forms contained impeaching material. Indeed, appellant's argument that refusal to order production of these forms deprived him of the opportunity to show non-reliance rests upon the vaguest suppositions: that the F. B. I. knew or learned of appellant's membership in the Communist Party prior to February 26, 1947; that the F. B. I. recorded this information on forms G-58 and G-59 and returned the latter forms to the Immi-

gration and Naturalization Service prior to February 26, 1947; that the completed forms G-58 and G-59 reached the files of appellant prior to February 26, 1947; that the Naturalization Examiners had this information before them when they acted upon appellant's Petition for Naturalization; and that forms G-58 and G-59 are still in existence and in possession of the Government. It is submitted that these speculations afforded an insufficient foundation for production of the documents demanded (*Lightfoot v. United States,* 24 L. W. 2319 (C. A. 7, 1955), cert. granted 24 L. W. 2319; *Scales v. United States,* 227 F. 2d 581 (C. A. 4, 1955); *Jencks v. United States,* 226 F. 2d 540, 552 and 226 F. 2d 553, 560-561 (C. A. 5, 1955)). *Fisher v. United States,* No. 14731 ..... F. 2d ..... (C. A. 9, Feb. 15, 1956—not yet reported), is distinguishable in that a much more definite and reliable foundation for the production of the documents for impeachment purposes was laid. There, appellant sought the production of the records of the Federal Bureau of Investigation to show the receipts prepared by the F. B. I. which were signed by informer Harley Mores for himself and his wife Mazie Mores for moneys paid them by the F. B. I. from 1942 to 1953 amounting to $10,530, $5,780 being paid from 1950 to May 21, 1953. These matters were undoubtedly brought out upon cross-examination. Thus, the impeaching character of the receipts to show bias was established. In the case at bar, it is only through tenuous speculation that appellant arrives at the conclusion that G-58 and G-59 would show non-reliance by the naturalization examiners.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 14,871

IN THE

United States Court of Appeals

For the Ninth Circuit

EDGAR RICHARD LEWIS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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No. 14,871

IN THE

United States Court of Appeals

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EDGAR RICHARD LEWIS,
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vs.

UNITED STATES OF AMERICA,
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Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant was convicted after a jury trial in the District Court for the District of Alaska, Third Judicial Division, at Anchorage, Alaska, the Honorable George W. Folta presiding, of two counts of the violation of the Alaska Uniform Narcotic Drug Act and two counts of the Federal Harrison Narcotic Act.

The Court sentenced the appellant to serve consecutive terms of imprisonment, totalling seventeen years. The appellant moved to vacate the sentences imposed upon him by the District Court, but his

petition has been denied. It is from the order denying his petition that the appellant now appeals.

Jurisdiction below was conferred by 28 U.S.C. 2255. Jurisdiction in this Court is also conferred by 28 U.S.C. 2255.

STATEMENT OF FACTS.

The appellant was found guilty by a District Court jury on January 26, 1953, on four counts involving violations of the narcotic laws. The events leading up to the appellant's conviction, as reported in his brief under the caption "Case History", are not altogether correct.

The files of the District Court will reveal the appellant was indicted in three cases which were consolidated for the trial. Those criminal cases have been designated as District Court Nos. 2551, 2555, and 2575.

The indictment in No. 2551 charged the appellant, Edgar Richard Lewis, and his reputed wife, Nancy May Lewis, with a violation of the Uniform Narcotic Drug Act of the Territory of Alaska; specifically, Section 40-3-2 ACLA 1949, of that Act, in that Edgar Richard Lewis and Nancy May Lewis, did on or about the seventh day of April, 1951, have in their possession a quantity of heroin and cannibus plant. This indictment was filed on October 29, 1951, by the Grand Jury in the District Court for the Third Division, Territory of Alaska. At the same time, the indictment in Criminal No. 2555 was filed and it charged Edgar Richard Lewis with having on the

twenty-sixth day of May, 1951, possession of heroin, in violation of the Uniform Narcotic Drug Act. Upon return of these indictments, the District Court set time of arraignment for Wednesday, October 31, 1951 at 10:00 A.M. On that date, Edgar Richard Lewis and Nancy May Lewis failed to appear and on the motion of the United States Attorney, the bail was forfeited and bench warrants issued by District Judge Anthony Dimond.

The proceedings in connection with the forfeiture of bail eventually reached this Court as the case of *Swanson v. United States,* 224 F. 2d 795, CA 9, No. 14231. On November 2, 1951, the Grand Jury returned a two count indictment in Criminal No. 2575, charging Edgar Richard Lewis and Nancy May Lewis with two counts of violations of the Federal Narcotic Act, commonly referred to as the Harrison Act. Edgar Richard Lewis and Nancy May Lewis were still fugitives and additional bench warrants were issued the same day that this new indictment was filed.

Nancy May Lewis was apprehended in New York City on June 6, 1952, and from there returned to Alaska. On August 11, 1952, she pleaded guilty to the two counts of the indictment in No. 2575. She also pleaded guilty at the same time to the indictment in No. 2551, and was sentenced to be imprisoned to a term of three years on each charge; all of the sentences were to run concurrently. Thorough examination of the files reveals no further additional entries in connection with Nancy May Lewis.

Edgar Richard Lewis was taken into custody at Chicago, Illinois, September 29, 1952, on the bench warrant issued in Criminal No. 2551. Removal proceedings caused the return of Lewis to the District of Alaska for his trial.

On January 7, 1953, on motion of the United States Attorney, Nos. 2551, 2555, and 2575 were joined together for trial and the trial was set for 10:00 A.M. January 23, 1953. Verne Martin, an Anchorage attorney, was appointed by the Court on January 7, 1953 as counsel for Lewis. The cases came on for trial on January 23, 1953, and at that time the District Court entered an order designating the indictments in numerical order for the purposes of trial. The Court designated the indictment in Criminal No. 2551 as Count I, the indictment in Criminal No. 2555 was designated as Count II, and the two count indictment in Criminal No. 2575 was designated as Counts III and IV.

The trial was completed on January 26, the case went to the jury, and the jury returned its verdict on the same day. Lewis was found guilty as charged of all four counts. On January 27, the District Court imposed sentences of four years on Count I, five years on Count II, four years on Count III, and four years on Count IV, the sentences to run consecutively for a total of seventeen years. Judgment incorporating the sentences of the District Court was entered on January 28, and on the same date the defendant filed a motion for a new trial. On February 11, the motion for a new trial was denied, and on February 18,

notice of appeal was filed. Examination of the files does not add further information in connection with the appeal of the defendant from his conviction, and it is assumed that he failed to pursue an appeal any farther.

On June 26, 1954, appellant sought to invoke the jurisdiction of the District Court under 28 U.S.C. 2255 and moved to vacate the judgment and sentence of Counts III and IV, alleging that the offense charged in those counts was the same offense as charged in Count I. On June 30, 1954, the District Court entered an order denying appellant's petition on the grounds that it appeared on the face of the motion that the petitioner was not entitled to relief. The appellant then lodged a notice of appeal with the District Court on July 22, 1954, from the denial by the District Court in granting the petition for correction of sentence under 28 U.S.C. 2255. At that time appellant also filed an affidavit *in forma pauperis.* On September 16, 1954, he filed a notice demanding the record on appeal be prepared and filed, and a new petition *in forma pauperis.* The file includes a minute order dated May 18, 1955, denying a motion to vacate the judgment and sentence.

On June 6, 1955, Edgar Richard Lewis again petitioned the District Court for a hearing under the provisions of 28 U.S.C. 2255. Before the District Court could rule on this new petition, the Court of Appeals (9), on June 9, 1955, Denman, Chief Judge, and Circuit Judges Bone and Orr in Misc. No. 452, denied appellant's petition for review of the order

of the District Court, denying his first motion to vacate the judgment and sentence. On June 17, 1955 the District Court entered an order denying the appellant's application of June 6, 1955 for a hearing. Finally, on August 18, 1955, the Court of Appeals vacated its order of June 9, and the proceedings are now finally before the Court.

ISSUES PRESENTED.

I.

A Court of appellate jurisdiction will not review mere errors of law occurring in the trial which might have been raised by way of direct appeal from a judgment of conviction.

II.

A Court of appellate jurisdiction will vacate a sentence imposed if the trial Court was without jurisdiction to impose such sentence, or if the said sentence is otherwise subject to collateral attack.

ARGUMENT.

I.

A COURT OF APPELLATE JURISDICTION WILL NOT REVIEW MERE ERRORS OF LAW OCCURRING IN THE TRIAL WHICH MIGHT HAVE BEEN RAISED BY WAY OF DIRECT APPEAL FROM A JUDGMENT OF CONVICTION.

Appellant has, under the caption "Questions for the Court to Consider", listed some fourteen questions.

Not all these questions should properly be considered in this appeal. In considering a proceedings brought under 28 U.S.C. 2255, it has generally been held that the appellate Court will not consider mere errors of law occurring during the trial of the case; that is, the so-called 2255 proceedings does not give a prisoner adjudged guilty of a crime the right to try over again on appeal the identical questions presented during trial.

Under a 2255 proceedings, the issues are limited generally to those instances where a sentence is void or otherwise subject to collateral attack. This general rule is subject to the one possible qualification that if a prisoner is held in custody and the trial in which he has been convicted was conducted in such a manner as to be a sham or a farce, then the appellate Court may review a conviction obtained under such circumstances.

The brief of the appellant discloses that he advances a number of objections to support his contention that he is wrongfully held in custody. The issues raised fall into two distinct classes or groups. He directs his attack to the manner in which his trial was conducted, and then he questions the validity of the indictments on which he was tried.

Turning to the allegations that first appear in appellant's argument, he contends that his arrest was illegal in that the officer arrested him improperly. The answer to this, of course, is that it has been held that a motion for vacation of a sentence under 28 U.S.C. 2255 cannot be used in lieu of an appeal to correct

errors committed during the course of trial, even though such errors relate to constitutional rights.

(*Davis v. United States,* (CA 7) 214 F. 2d 594, 596;

Adams v. United States ex rel. McCann, 317 U.S. 269, 274;

Crawford v. United States, (CA 6) 219 F. 2d 478;

United States v. Rutkin, (CA 3) 212 F. 2d 641, 642;

Bozell v. Welch, (CA 4) 203 F. 2d 711, 712;

Klein v. United States, (CA 7) 204 F. 2d 513, 514;

United States v. Rosenberg, (CA 2) 200 F. 2d 666, 668.)

These cases may be distinguished from *Price v. Johnson,* 334 U.S. 267, where certiorari was granted to the Ninth Circuit. Habeas corpus will be granted where a question of due process is raised, and in *Price v. Johnson* it was held that the District Court should have heard the petitioner's allegations that the Government had obtained perjured testimony in securing conviction.

Continuing at page 8 of his brief, appellant argues that the Government has failed in the trial to prove continuity of possession of certain physical objects offered into evidence. This particular allegation evidently concerns the offering into evidence of a narcotic drug as an exhibit. Whether such physical objects were or were not properly admitted in evidence

probably would again be a matter properly raised by way of a direct appeal from the conviction.

Appellant next raises a question of the sufficiency of the evidence introduced at his trial and contends that the Government suffered a complete failure of proof to convict him. The answer to this is that the weight and substance of the evidence is within the province of the trial judge and the trial jury and again a question which properly should be raised on appeal from the conviction.

Appellant alleges that the former United States Attorney acted improperly in that he made derogatory remarks about the character of the appellant during the argument to the jury. Again, it has been held that such an allegation will not be considered in a proceedings to vacate a sentence.

(*Pelley v. United States,* 214 F. 2d 597.)

On page nine of his brief, the appellant alleges that the testimony of an expert witness was received by the Court, contrary to "Rule 28, Section 464, FCC". The trial Court has authority conferred upon it to appoint an expert witness when needed in the discretion of the Court. The appellant has in mind, of course, Rule 28 of the Federal Rules of Criminal Procedure, but the allegation on its face indicates that the appellant here misunderstands the rule. Rule 28 does not restrict the right of a party to call an expert witness of its own selection.

(Vol. 4, *Barron and Holtzoff,* Section 2213, page 229.)

Appellant is confused, apparently, in the circumstances under which the narcotics agent testified at the trial.

II.

A COURT OF APPELLATE JURISDICTION WILL VACATE A SENTENCE IMPOSED IF THE TRIAL COURT WAS WITHOUT JURISDICTION TO IMPOSE SUCH SENTENCE, OR IF THE SAID SENTENCE IS OTHERWISE SUBJECT TO COLLATERAL ATTACK.

The second group of allegations made by the appellant follow in chronological order and begin at page 10 of his brief. These allegations are directed toward the indictments on which appellant was tried and convicted.

He alleges that the indictments are duplicitous and that several crimes are charged in the same indictment. In examining the argument of the appellant further, however, it appears that what he, in fact, now objects to was trial together of the several indictments found against him. Authorization for joinder of indictments for trial is found under the Federal Rules of Criminal Procedure, Rule No. 13. It is clear that under this rule the trial Court has the discretion to order trial together of indictments which might have been joined in the same indictment under Rule 8, Federal Rules of Criminal Procedure. Relief for prejudicial joinder is provided for by Rule 14, Federal Rules of Criminal Procedure. The record does not show any effort on behalf of appellant to obtain a separate trial in District Court.

More substantially, however, is the appellant's complaint that he has been charged with the same offense under both the Territorial Statute (40-3-2 ACLA 1949) and the Federal laws (26 U.S.C. 2553 and 26 U.S.C. 2593). The indictment in Criminal No. 2551 designated as Count I, is similar to the two counts of the indictment in Criminal No. 2575. Specifically, the date of the offense is identical in both indictments, the parties named as defendants are identical, and the possession of the same type of narcotic drugs is alleged. From these circumstances, it appears certain that the same transaction has been relied upon as the basis for these two indictments. It is not clear on what theory the Government proceeded at the time the indictments were drawn, but examination of the statutes involved and the somewhat limited authority available, leads to the conclusion that charging the offense in this manner was error. The Uniform Narcotic Drug Act of the Territory of Alaska, Section 40-3-21 ACLA 1949, provides that no prosecution may be had under the Alaskan Act if such person has been convicted or acquitted under the Federal laws of the same act or omission. The specific statute is set out as follows:

4-3-21

Effect of Acquittal or Conviction
Under Federal Narcotic Laws

> "No person shall be prosecuted for a violation of any provision of this Act if such person has been acquitted or convicted under the Federal Narcotic Laws of the same act or omission, which, it is alleged, constitutes a violation of this Act."

It might be argued that this prohibition might not apply when the same offense is charged under the Alaskan Act and under Federal Narcotic Laws concurrently. It is not the intention, however, of the Government to rely on an argument of doubtful merit and which is plainly contrary to the meaning of 40-3-21. This particular provision (40-3-21) has not been construed by the Courts in the Territory of Alaska, but an identical Act is found in the laws of the State of Arizona. The Supreme Court of Arizona has held that an acquittal of the possession of drugs under the Harrison Narcotic Act is a bar to prosecution for possession of the same drugs under the State Act. The Arizona decision is believed to be correct.

(*United States v. Worton,* 160 Pac. 2d 352.)

The Government's position then assumes that the two count indictment in Criminal No. 2575 charges an offense and that conviction under these counts is within the prohibition of 40-3-21 ACLA 1949. The sentence imposed on appellant in Count I should be vacated.

Criminal No. 2555, designated as Count II for trial, charges a violation of the Alaska Uniform Narcotic Drug Act. A reading of the indictment leaves no doubt that the offense charged under this indictment stems from a distinct and separate transaction than the transaction upon which the indictments in the other three counts are founded. The form of the indictment itself, while not in good pleading, is believed sufficient in that it charges an offense, and, therefore, the validity of this judgment and sentence

should be sustained. Finally, the two count indictment in Criminal No. 2575, designated for the purposes of trial as Counts III and IV, is clearly in bad form, but the indictments do appear to charge an offense and should be sustained. Similar indictments have been before this Court and have been upheld.

(*Barker v. United States,* (CA 9) 6 F. 2d 419, certiorari denied, 269 U.S. 579;

Ching Wan v. United States, (CA 9) 35 F. 2d 666;

Ballestrero v. United States, (CA 9) 5 F. 2d 503.)

Assuming that Count I is set aside, then the sentences imposed under Counts II, III, and IV should advance. Therefore, the sentence imposed under Count II should date from the 27th day of January, 1953, in accordance with the rule set forth in *Blitz v. United States,* 153 U.S. 308. Also, *United States v. Tufanelli,* 138 F. 2d 981.

CONCLUSION.

We summarize the Government's argument in this fashion.

All of appellant's allegations, with the exception of those allegations directed to the validity of the indictments on which he was tried and convicted, are matters which properly should have been raised on direct appeal of his conviction and should not be considered on appeal from a denial of the District Court to vacate the sentences pursuant to 28 U.S.C. 2255.

Review of the indictments on which the appellant was tried and convicted indicate that the indictment in Criminal No. 2551 charges the same offense as the two counts of the indictment in Criminal No. 2575. Further, that the Uniform Narcotic Drug Act for the Territory of Alaska, ACLA 40-3-21, prohibits prosecution of the same offense if brought under Federal Harrison Law. If the two count indictment in Criminal No. 2575 is sufficient to charge an offense, the sentences imposed on this indictment should not be vacated and set aside. It is urged that the indictments in both Criminal No. 2555 and Criminal No. 2575 charge an offense and should be sustained.

In conclusion, this Court should remand the case to the District Court with instructions to vacate and set aside the sentence imposed in Count I. Counts II, III, and IV should not be affected thereby except to the extent that they will advance as to their effective dates, following the rule announced in *Blitz v. United States,* 153 U.S. 308, and *United States v. Tufanelli,* 138 F. 2d 981.

Dated, Anchorage, Alaska,
November 10, 1955.

Respectfully submitted,

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